Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1483

CITY OF CHICAGO, a municipal corporation,

Petitioner,

vs.

KENNY CONSTRUCTION COMPANY, a corporation,
S. A. HEALY COMPANY, a corporation, and
JAMES McHUGH CONSTRUCTION COMPANY, a corporation,
d/b/a **KENNY-HEALY-McHUGH**, a joint venture,
and **ROYAL INDEMNITY COMPANY**, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner City of Chicago, a municipal corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United Court of Appeals for the Seventh Circuit, entered in this proceeding on December 15, 1975 (rehearing denied, January 15, 1975).

OPINIONS BELOW

The opinion of the Court of Appeals, filed on December 15, 1975, is reported at 528 F.2d 184 and is reproduced in Appendix C to this brief. The order of the Court of Appeals, entered on January 15, 1976, is reproduced in Appendix D.

The findings of fact and conclusions of law of the District Court, entered on June 7, 1974, are unreported, but are reproduced in Appendix A. The judgment of that Court is unreported, but is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 15, 1975. The Court of Appeals denied the City's petition for rehearing on January 15, 1976.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court should have abstained from interfering in previously filed, ongoing civil litigation in the state courts.

2. Whether the Court of Appeals has decided an important state question of law in a way in conflict with applicable state law.

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3. Whether several substantial claims against the petitioner City of Chicago for property damage, alleged to have occurred in proximity to the construction of a subway for the City, are subject to an indemnification provision in the City's contract with the respondent construction companies for the construction of the subway, in which provision the construction companies agreed to hold the City harmless from all damage claims accruing against the City in consequence of the granting of the contract or which might in any way result therefrom, including claims arising from negligence or omission by employees of the City.

4. Whether the respondent insurance company, under the indemnity policy issued by it to the respondent construction companies, is obligated to indemnify the petitioner City of Chicago against claims resulting from or arising in consequence of the granting of the subway construction contract, including claims against the City of Chicago arising from the allegedly negligent relocating of sewer and water pipes by City employees resulting from and arising in consequence of the granting of the construction contract.

5. Whether the respondent construction companies were guilty of negligence in failing to take reasonable measures to protect buildings adjacent to the excavating and subway construction activities performed by the respondent construction companies.

STATEMENT OF THE CASE

This is an action brought by an indemnity insurance company against the City of Chicago and three construction companies. It sought a declaratory judgment to the effect that the insurance company is not obligated, under its indemnity policy with the construction companies—in which the City is named as an additional insured—to defend and assume liability in a number of property damage suits pending in the Illinois courts.

Federal jurisdiction is based on the diversity of citizenship of the parties.

The controversy arose out of the construction of a half-mile segment of the Chicago Transit Authority subway on the Milwaukee Avenue-Kennedy Expressway line. The segment involved is on Milwaukee Avenue, just northwest of Logan Square, in Chicago.

The Subway Project

The Milwaukee Avenue-Kennedy Expressway extension of the Chicago Transit Authority subway on the northwest side of Chicago is approximately five miles long. Construction of this subway was divided into a number of segments, which were worked upon and completed by various general contractors or combinations of them. These contracts were awarded to the general contractors pursuant to standard bidding procedures.

The section of the subway with which we are concerned, was built by three large and well-known contractors—the respondents Kenny Construction Company, S. A. Healy Company and James McHugh Construction Company—that cooperated in a joint venture known as Kenny-Healy-McHugh, referred to in this brief as the Joint Venture.

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The Indemnification Provision In The Subway Construction Contract

On June 23, 1967, the three respondent construction companies, cooperating in the Joint Venture, entered into a contract with the petitioner City of Chicago, known as the K4 contract to construct 2560 lineal feet of subway in open cut on Milwaukee Avenue in Chicago. Under this contract, the Joint Venture was to furnish all labor, materials, plant, equipment and incidentals and perform all operations, including all appurtenant and collateral work.

Section III of Part 2 of the K4 contract, entitled Care of Existing Structures and Property and Contractor's Liability, p. ASC-13, provided as follows:

> "The Contractor shall familiarize himself with the requirements of local and state laws applicable to underpinning, shoring and other work affecting adjoining property, and wherever required by law the Contractor shall shore up, brace, underpin, secure and protect as may be necessary all foundations and other parts of existing structures adjacent to, adjoining, and in the vicinity of the site, which may be in any way affected by the excavations or other operations connected with the work to be performed under this contract. The Contractor shall be responsible for the giving of any and all required notices to any adjacent or adjoining property owner or other party and such notice or notices shall be served in sufficient time as not to delay the progress of the work under this contract. The Contractor shall indemnify, save and keep the City harmless from any damages on account of settlements or the loss of lateral support of adjacent or adjoining property and from all loss or expense and all damages for which the City may

become liable in consequence of such injury or damage to adjacent and adjoining structures and their premises.

"The provisions of the foregoing paragraph shall be construed to include also and apply to any liabilities and duties placed upon the City of Chicago as owner or occupant of the property on which the improvements provided for herein are to be constructed, by the provisions of an Act entitled 'An Act to prescribe the duty of an owner or occupant of lands upon which excavations are made in reference to the furnishing of lateral and subjacent support to adjoining lands and structures thereon.' See Chap. 70, Par. 10, Illinois Revised Statutes 1965."

The K4 contract also contained the following indemnity provision:

"INDEMNITY

"Contractor shall indemnify, keep and save harmless the City, its agents, officials and employees against all injuries, deaths, loss, damages, claims, patent claims, suits, liabilities, judgments, costs and expenses, *which may in anywise accrue against the City in consequence of the granting of this contract or which may in anywise result therefrom, whether or not it shall be alleged or determined that the act was caused through negligence* of the Contractor or his employees, if any, or *of the City of Chicago or its employees*, and the contractor shall, at his own expense, appear, defend and pay all charges of attorneys, and all costs or other expense arising therefrom or incurred in connection therewith, and, if any judgment shall be rendered against the City in such action, the Contractor shall, at his own expense, satisfy and discharge the same. Contractor expressly understands and agrees that any performance bond or insurance protection required by this contract, or otherwise provided by the Contractor, shall in no way limit the responsibility to indemnify, keep and save

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harmless and defend the City as herein provided." (Emphasis supplied.)

The Indemnity Insurance Policy

The K4 contract also obligated the Joint Venture to secure indemnity insurance, including indemnity for property damage to the amount of $500,000.

In partial fulfillment, but only partial fulfillment, of this obligation, the Joint Venture on March 18, 1968, obtained an indemnity insurance policy from respondent Royal Indemnity Company, with property damage coverage of $250,000. Under the terms of the policy Royal assumed the following duty, among others:

> "The company will pay on behalf of the insured all the sums which the insured, *by reasons of the contractual liability assumed* by him under any written contract of the type designated in the schedule for this insurance, shall become legally obligated to pay as damages . . . " (Emphasis supplied.)

Royal also agreed to defend property damage suits brought against the insured by reasons of its contractual liability. The City of Chicago was made an additional insured under the policy.

Sewer And Water Pipe Lines

The excavation for this section of the subway on Milwaukee Avenue required that the sewer and water lines be relocated. Prior to construction of the subway, those utilities occupied their customary place in the middle of the street. The excavation for the subway could not go forward until these were removed (Kuehl Dep. 278).

In consequence, the Joint Venture and the City agreed that the sewer and water lines would be taken up from the street and placed under the sidewalks on each side of Milwaukee Avenue. This was spelled out in the K4 contract between them in the drawings which were, by specific reference, part of the contractual document. The "G" series of drawings, which form a part of the 94 contract drawings, show the proposed locations and depths of excavation for the new sewer and water pipes, specifying the type, size and composition of the respective pipes to be installed. All this work was within the job site of the K4 contract.

It was further agreed between the Joint Venture general contractors and the City that most of this work of locating the new sewer and water pipes was to be done by the work forces of the City's Department of Water and Sewers. The symbols for this municipal department show this on the contract drawings, although the contract map as to sewer and water lines bore the legend, "To be done by others." However, not all the sewer work was done by the City; the Joint Venture did some of the sewer construction, for example at 2663-69 N. Milwaukee Avenue (T. 1343).

The $180,170 cost of the relocation of the sewer and water pipes carried out by City employees was paid for out of contract funds. Two-thirds of these monies were derived from grants from the federal government, made pursuant to statute and contract, and one-third was paid for by the City (R. 71). The evidence of this undisputed fact was excluded by the trial court as irrelevant, but was incorporated in the record as an offer of proof under Rule 43, F.R. Civ. P.

Throughout the relocation of the utilities and the excavation for and construction of the subway, there was

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close working cooperation between the Joint Venture general contractors and the City. Engineers representing each of them were at the job site full time during the execution of the project. John A. Monahan filled this role for the City (T. 421), Jack Kennedy for the general contractors (T. 414). Apparently Monahan was present at the project before March 22, 1968 (T. 421). That was the day Kennedy opened the Joint Venture's field office on the job site (T. 417).

The sewer and water work done by City employees was performed in April and May, 1968. The construction work by the Joint Venture was begun in June, 1968, with the placing of piles in preparation for the subway excavation.

Relocation of the sewer and water lines involved breaking up the existing sidewalks and digging a trench approximately 6 feet across and 11 to 12 feet deep. The trench was some 4 feet from the building line, in some places less. After the sewer was laid in a bed of stone, the trench was backfilled with sand. In those areas where a water line was placed over a sewer line, the excavation was reopened to a depth of 5-1/2 to 6 feet. After the water lines were installed, the excavation was again backfilled with sand and then asphalt was laid on top.

The Subway Excavation

Excavation for the subway was by the open cut method. Milwaukee Avenue at this point is 50 feet wide from curb to curb. The subway cut was the standard 35 feet in width and 36 to 40 feet in depth (T. 1243, 1244). Before excavating commenced, soldier piles were installed on both sides of the cut at intervals of six feet (T. 1004). There was no pile-driving. Instead, augering was employed. (T. 741, 1245). A hole 41 feet deep was cut for

each soldier pile (T. 1001). This work was carried out by the Joint Venture's subcontractor, Great Lakes Engineering Corporation. The steel supports in the holes were then surrounded by poured concrete and the concrete was allowed to set for days (T. 1001, 1004).

Excavating then commenced. The first cut was nine feet deep (T. 1244). Steel sheeting was installed between the soldier piles (T. 780). Timbers were added at certain depths (T. 1178). Then another nine foot deep cut was made and more steel sheeting was put in. This procedure was followed until a depth of 30 to 40 feet was reached (T. 1243, 1244).

A concrete base for the subway was next poured and set (T. 50). Walls of concrete were poured and set, and finally a permanent concrete roof was placed over the subway.

The soldier piles were installed between May 17, 1968, and July 15, 1968. The excavation was cut and logging put in between August 13, 1968, and August 31, 1968. The concrete base was poured between September 10, 1968, and October 24, 1968. The subway walls were concreted between October 31, 1968, and January 20, 1969. The permanent roof of the subway was installed between November 1, 1968, and January 30, 1969 (T. 50).

Property Damage Claims

The section of Milwaukee Avenue through which the K4 segment of the subway was built is a busy commercial neighborhood. Both sides of the street are crowded with stores, located in three and four story buildings with offices and apartments on the upper floors. The structures are 40 or more years old.

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In time seven lawsuits were filed in the Circuit Court of Cook County, Illinois, against the Joint Venture and the City, alleging property damage claimed to have resulted from the construction activities for the subway. The ad damnums aggregated in excess of $2,300,000.00.

The defendants in these suits made demand upon respondent Royal Insurance Company to defend. This precipitated the instant action by the insurer in the federal courts for a declaratory judgment to the effect that Royal has no liability.

At the trial it was contended by respondent Royal that the City employees digging the excavation for the new sewer had failed to shore up and protect the adjacent structures. And it was contended by the petitioner City that most of the damage was caused by the respondent Joint Venture in making the far deeper excavations for the subway without shoring up and protecting the adjacent structures. The Joint Venture had been notified by its subcontractor, Great Lakes Engineering Corporation, on June 15, 1968, of the previous condition of some of these structures. And the City had expressly reminded the Joint Venture on June 26, 1968, of the Joint Venture's duty, as an excavator, under Illinois Rev. Stat. ch. 70, par. 10 (now embodied in ch. 17-1/2, par. 51), to shore adjacent structures.

There was clear evidence that some of those buildings were on shallow, inadequate foundations, without proper footings, and that they had already developed serious cracks in their foundations and walls before the City began digging up the sidewalks.

Despite these warnings, the Joint Venture went ahead with its 40 foot deep subway excavation without doing any shoring of the exposed structures.

Damage To The Lanski Building

In the record in this case there is far more discussion of damage to the so-called Lanski Building than of damage to all the other adjacent structures on Milwaukee Avenue combined. The Lanski Building was formerly on the east side of Milwaukee Avenue between Sawyer and Spaulding. It was 75 feet wide, 70 feet deep and three stories high. It was claimed that it had to be demolished as a result of the various excavating operations incident to the subway construction.

At the time the sewer work was completed on May 10, 1968 (T. 1091), the Lanski Building had subsided three-quarters of an inch (T. 555). By June 18, 1968, it had sunk 1-1/2 inches (T. 841). The Joint Venture's subway excavation to a depth of 40 feet, within 12 feet of the Lanski Building, was dug on August 31, 1968 (T. 1644). By September 9, 1968, the Lanski Building had sunk 2 inches in all (T. 1671). By October, 1968, it had subsided 2-1/2 inches; by November, 1968, 4-1/16 inches; by January 8, 1969, 5 inches; and by February 10, 1969, 5-3/4 inches, causing the whole structure to lean slightly westward (Kuehl Dep. 239). Thus, most of the subsidence of the Lanski Building occurred after the Joint Venture's deep subway excavation.

As late as February, 1969, Henry Kuehl, a consulting civil engineer with 60 years of professional experience, who was employed by both the Joint Venture and Royal, reported to his clients that the Lanski Building could still be saved by shoring and underpinning at a cost of $15,000 (T. 645-6, 1821). But nothing was done and Kuehl was instructed by his clients not to make any more recommendations (Kuehl Dep. 380).

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The Question Of Causality—Expert Testimony

At his deposition, Kuehl gave it as his professional opinion that the damage to the Lanski Building had been progressively caused by both the sewer and subway excavations (Kuehl Dep. 280, 287, 453). And at the trial he still stated that, if only the sewer work had been done, it was questionable whether the Lanski Building would have deteriorated to the extent it did (T. 1932).

However, Kuehl concluded his trial testimony with an opinion more favorable to his employer, the Joint Venture, declaring that the damage caused by the Joint Venture was not a substantial part of the total damage to the Lanski Building and that the Joint Venture's construction of the subway did not contribute to the damage (T. 202).

Kuehl did not explain why he had changed his opinion.

The City's Counterclaim

In a counterclaim, which it sought to enforce by a motion for summary judgment, the City argued that, even if employees of the City had negligently caused all the damage, the City was entitled, under the K4 contract, to be indemnified by the Joint Venture for all damage claims against the City which in any way happened in consequence of the granting of that contract or which in anywise resulted therefrom, including allegedly negligent performance of the sewer and water pipe work.

On the same basis, the City claimed it had a right to be indemnified by respondent Royal Insurance Company, under the policy it had issued to the Joint Venture, to the extent of its coverage of $250,000.

The Judgment Of The District Court

At the conclusion of 13 days of trial, the District Court on April 1, 1974, gave expression to the following oral finding (T. 2372, 73);

> ". . . It is my judgment, as far as the evidence is concerned in this case, that the City simply made a terrible mistake in its sewer work and in its water work, and took no precautions at all, and they cannot pass that on to the contractors, because there is just no evidence that the contractors' work contributed to this."

Written findings of fact and conclusions of law were signed by the District Court on June 6, 1974. (See Appendix A.) Judgment was entered on the same day. (See Appendix B.)

In its written findings the Court incorporated the oral findings quoted. (App. 2a.) It also formally found that the City was an "additional insured" under the policy and that Royal had assumed the "contractual liability" of the Joint Venture. But the court further found that Royal had fulfilled its obligations under the policy by defending the Joint Venture in the underlying lawsuits in the state courts.

The conclusions of law stated that the damages were caused by the City, but did not accrue from the granting of the K4 contract or result therefrom. The cross-claim of the City against the Joint Venture was disallowed. It was held that the Joint Venture was not obligated to defend the City in the underlying suits in the state courts.

The judgment reiterated these findings and conclusions. It also restrained the plaintiffs in the state court actions, who had been named by Royal as parties defendant in the federal court action from prosecuting their claims against the Joint Venture and enjoined the

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City from counterclaiming against the Joint Venture in the state courts.

The judgment awarded the Joint Venture $25,000 against Royal in payment of the Joint Venture's attorney's fees in the District Court.

The duly filed motion of the City for a new trial was denied by the District Court on June 19, 1974.

The Several Appeals

Notice of appeal to the Court of Appeals for the Seventh Circuit was filed by the City on July 18, 1974.

Notice of cross-appeal was filed by Royal on July 29, 1974, from (1) the conclusion of law and the judgment that the Joint Venture did not breach any condition of its insurance policy and was entitled to the coverage recited in the policy issued by Royal; and (2) the award of $25,000 attorney's fees to the Joint Venture, payable by Royal (R. 159).

Notice of cross-appeal was also filed by the Joint Venture on August 1, 1974, from the award of only $25,000 attorney's fees in the instant case, in lieu of the $75,000 requested.

The several appeals were consolidated by order of the Court of Appeals on October 16, 1974.

The Opinion Of The Court Of Appeals

On December 15, 1976, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court in favor of respondent Royal Indemnity Company and against the petitioner City of Chicago on the claim, cross-claim and counterclaim. The Court of Appeals also reversed the District Court's

award of $25,000 in attorney's fees to the Joint Venture, wholly disallowing the latter's request for an increase in such fees. (Appendix C.)

On January 15, 1976 the Court of Appeals denied the City's petition for rehearing. (Appendix D.)

The opinion of the Court of Appeals held that the District Court correctly found that the City was sole cause of all the damage. In reaching this conclusion, it disregarded without discussion the extensive substantial evidence to the contrary in the record. The Court of Appeals also ignored the patent self-contradiction in the testimony of Kuehl, the respondents' expert witness.

The counterclaim of the City was disposed of with brevity. In that counterclaim the City had maintained that, even if, assuming *arguendo*, employees of the City had caused all the damage by their negligence, the City was entitled, under the clear and express terms of the K4 contract, to be indemnified by the Joint Venture for all damage claims against the City arising out of the sewer and water pipe relocation work resulting from, and indeed necessitated by the granting of the K4 contract. On the same basis, the City had contended that it had a right to be indemnified by the Royal Indemnity Company under the policy Royal had issued to the Joint Venture, to the extent of the coverage of $250,000.

Finding that the coverage of the insurance policy was expressly limited to "work done under the K4 contract," the Court of Appeals then went on to extend this principle to the indemnification clause in the K4 contract. Despite the unambiguous language in that contract—"which may in anyway accrue . . . in consequence of the granting of this contract or which may in anywise result therefrom"—and the obvious fact that the relocation of the sewer and water lines resulted from the granting of the contract, the Court of Appeals held that the "intent

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of the parties" was to limit the indemnity clause to claims arising from work done under the K4 contract itself.

There is no evidence in the record that it was ever the intent of the City or of the Joint Venture thus to limit the scope of the indemnification clause.

The opinion of the Court of Appeals even declares (App. 28a), "The City does not argue that it [the indemnity clause] extends as far as the words might indicate." This statement is wholly inaccurate. At all times the City of Chicago has maintained, and still maintains, that the language of the indemnity provision means exactly what it says.

The opinion of the Court of Appeals then went on to discover an additional reason for restricting the indemnity clause to work done under the K4 contract, saying (App. 28a):

> "The key reason for this conclusion is that in addition to the K4 contract under which the Venture assumed responsibility for building a portion of the Chicago subway, various other contracts were let. The Venture was required under the 'Other Contracts' clause of K4 to cooperate with contractors and City employees who were performing tasks outside of the K4, (K-4, p. GC-6). To hold that the Venture (and therefore Royal) contracted to assume responsibility for negligence or omissions of any of these collateral contractors would obviously be absurd. As we see it, the City in conducting collateral sewer work was equally a collateral contractor. We, therefore, conclude that the indemnity clause was never intended to extend to such collateral activity, and, therefore, does not operate to shift responsibility for the City's negligence to the Venture or to Royal." (Emphasis in the original.)

This statement of the Court is wholly without support in the terms of the K4 contract or anything else in the record. The K4 contract, while requiring the Joint Venture to cooperate with other contractors, said absolutely nothing about the Joint Venture assuming any liability for the negligence of other contractors. But the K4 contract did lay on the Joint Venture the express obligation—without any limitation in amount—to indemnify the City for liability for damages resulting from the negligence of City employees "which may in any wise accrue against the City in consequence of the granting of this contract or which may in any wise result therefrom."

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL PRINCIPLE OF COMITY REQUIRED THE DISTRICT COURT TO ABSTAIN FROM INTERFERING WITH THE PREVIOUSLY FILED, ONGOING STATE COURT PROCEEDINGS.

THE DISTRICT COURT, IN NOT DOING SO, COMMITTED REVERSIBLE ERROR.

FOR THE SAME REASON, THE AFFIRMANCE OF THE DISTRICT COURT BY THE COURT OF APPEALS WAS ALSO REVERSIBLE ERROR.

The jurisdiction of the federal courts over this case rests solely on the diversity of citizenship of the parties. No federal constitutional questions, no federal statutory questions are presented herein. Adjudication of the controversy entails only the application of Illinois law to transactions and events occurring wholly in Illinois.

This case was not removed to the federal courts after first being instituted in the state courts. It was originally filed in the federal courts. And it was filed there after several lawsuits involving this controversy had already been instituted in the state courts and were pending there.

This case was filed in the district court on September 25, 1970. At that time there were pending in the Circuit Court of Cook County, Illinois, the following lawsuits:

> (1) *American National Bank, Trustee v. City of Chicago and Kenny Construction Company et al.*, Nos. 69 CH 1150 and 6305. These cases related to the Lopin properties at 2663-69, 2715-27 and 2731-39 N. Milwaukee Avenue. They asked for $1,000,000 damages,

(2) *Oak Park Trust & Savings Bank, Trustee, Burton E. Lanski and Iris L. Stein v. City of Chicago, Kenny Construction Company, et al.*, No. 69 CH 1823. This related to the Lanski Building at 2747-65 North Milwaukee Avenue. It sought $800,000.00 damages.

(3) *Lee Optical Company of Missouri, Inc. v. City of Chicago, Kenny Construction Co., et al.*, No. 69 L 11321. This case was brought by a tenant of the Lanski Building.

(4) *Continental Illinois National Bank and Trust Co., Trustee, Executor of Will of Alexander Flicht and Leo Flicht v. City of Chicago, Kenny Construction Co., et al.*, No. 70 L 13376. This case concerned the Flicht (or Glovemakers') Building at 2701-09 N. Milwaukee Avenue.

Subsequently to the institution of the instant proceeding in the federal courts, three other similar suits were commenced in the Circuit Court of Cook County, Illinois. These were *Charles Borowski v. Kenny Construction Co., et al.*, No. 72 L 2493; *LaSalle National Bank, Trustee, William S. Vasilopoulos et al., v. City of Chicago, Kenny Construction Co. et al.*, No. 73 L 3637, seeking $200,000 damages; and *Paramount Theatre Building v. City of Chicago, Kenny Construction Co. et al.*, No. 73 L 2637, seeking $300,000 damages.

Respondent Royal Indemnity Company was under a contractual duty to defend these cases on behalf of the Joint Venture. It did so—up to a point. But it soon sought and at length obtained a declaratory judgment in the federal courts to the effect that it was not obligated to defend these state court cases.

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Not content with that, Royal also obtained a judgment in the District Court that the City was responsible for all the damage and an injunction, restraining the plaintiffs in the state court actions from prosecuting their claims against the Joint Venture and enjoining the City from counterclaiming against the Joint Venture in the state courts.

The effect of the injunction entered herein, and its affirmance by the Court of Appeals is effectively to establish the supremacy of the federal district courts over the state courts in matters of purely state law. And the result arrived at by the federal courts was, we submit, based upon a misinterpretation of Illinois contract law.

This unfortunate result, in which a federal court enjoins previously pending state court proceedings brought under state law, would have been avoided if the District Court had heeded 28 U.S.C. § 2283, which bars federal court injunctions "to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Another error stemming from the District Court's improper intervention was that it decided seven different controversies on the basis of a trial of only one of those controversies. The record is devoid of any factual evidence concerning the disputes in the six other cases. Yet the District Court did not hesitate to enter an injunction precluding a judgment for the City in any of the six other cases.

Only a little over a year ago this Court had occasion to strike down such federal litigation of issues presented by ongoing state civil proceedings. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the Court applied the absten-

tion principles enunciated in *Younger v. Harris*, 401 U.S. 37 (1971) and its companion cases,* to federal intervention in state civil proceedings. It will be recalled that in *Huffman v. Pursue, Ltd.*, the plaintiff, the owner of a motion picture theatre, instituted a civil rights action under 42 U.S.C. § 1983 to enjoin a pending state civil proceeding brought under state statute, to close the theatre for one year as a public nuisance on the ground that it displayed pornographic films. The theatre owner alleged that the officials' use of the nuisance statute constituted a deprivation of federal constitutional rights under color of state law. The district court declared the nuisance statute unconstitutional on First Amendment grounds and enjoined execution of the state court's judgment insofar as it closed the theatre to films that had not been adjudged obscene in prior adversary proceedings.

Although the abstention principle of *Younger v. Harris* had not been raised in the District Court, this Court reversed the judgment of the District Court solely on abstention grounds and remanded the case to the District Court for proceedings in accordance with that principle.

In *Huffman v. Pursue, Ltd.*, this Court held that, in view of the comity and federalism interests that *Younger v. Harris* sought to protect, a litigant should not be permitted "the luxury of federal litigation of issues presented by ongoing state proceedings" (420 U.S. at 605). The Court declared that even assuming, *arguendo*, that litigants are entitled to a federal forum for resolution of all federal issues, that entitlement is most

* *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesman*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); and *Byrne v. Karalexis*, 401 U.S. 216 (1971).

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appropriately asserted by a state litigant when he seeks to relitigate a federal issue adversely determined in completed state court proceedings—that is, on review by this Court of completed appellate proceedings in the appropriate higher state courts.

As Mr. Justice Black, writing the opinion of the Court in *Younger*, stated (401 U.S. at 45):

> "It has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin proceedings in state courts is not to issue such injunctions."

This judicial policy is based, Mr. Justice Rehnquist declared in the opinion for the Court in *Huffman v. Pursue, Ltd.* (420 U.S. at 600, 601), not only on the traditional doctrine that a court of equity should stay its hand when the movant has an adequate remedy at law, but also on the comity aspect of federalism.

In *Younger v. Harris*, 401 U.S. at 44, the Court described this "comity" as follows:

> "[T]he notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

A fortiori, this federal principle of comity should be respected in the case at bar, which presents no federal issues requiring a federal forum at any time.

The District Court and the Court of Appeals should have abstained from interfering with the previously filed, ongoing state court cases.

II.

IN RULING THAT THE INDEMNIFICATION PROVISION WAS INAPPLICABLE, THE COURT OF APPEALS DECIDED A QUESTION OF STATE LAW IN CONFLICT WITH THE RELEVANT STATE LAW OF ILLINOIS.

It is undisputed that the contract between the Joint Venture and the City contained a provision in which the Joint Venture undertook to "indemnify, keep and save harmless the City" from all liabilities accruing against the City "in consequence of the granting of this contract or which may in any wise result therefrom, whether or not it shall be alleged or determined that the act was caused through negligence . . . of the City of Chicago or its employees . . ."

It is also clear from the testimony of plaintiff's witness, Richard Foss, who did the underwriting of the comprehensive general liability policy issued by Royal covering the Joint Venture in its performance of the obligations it assumed under the K4 contract (T. 161 et seq.), that Royal, before issuing the policy, investigated the project with great care and had only itself to blame if it was not thoroughly familiar with or did not understand the contents and implications of the K4 contract before assuming the obligations of its policy.

Since the only ground that has been claimed for federal jurisdiction over this controversy is the diversity of citizenship of the parties, and the contracts involved were made and performed in Illinois, the dispute must be settled according to the law of Illinois. *Chicago and Northwestern Ry. Co. v. Chicago Packaged Fuel Co.*, 195 F. 2d 467, at 470 (7 Cir. 1952); *Pennsylvania R. Co. v. Chicago, M. St. P. & P.R. Co.*, 389 F. 2d 67 (7 Cir., 1968). See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and subsequent cases relying thereon.

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The higher courts of Illinois have repeatedly upheld the legality of such contractual indemnification—even when the indemnitee is saved harmless from the consequences of its own negligence or that of its employees. *Tatar v. Maxon Construction Co.*, 54 Ill. 2d 64 (1973); *Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corp.*, 395 Ill. 429 (1947); *Gust K. Newberg Construction Co. v. Fischback, Moore & Morrisey, Inc.*, 46 Ill. App. 2d 238 (1964); *Tenenbaum v. City of Chicago*, 11 Ill. App. 3d 987 (1973); *Fosco v. Anthony R. Delisi*, 103 Ill. App. 2d 457 (1968); *Northern States Company, Inc. v. A. Finkl & Sons Co.*, 8 Ill. App. 2d 419 (1956).

The U.S. Court of Appeals for the Seventh Circuit has in the past applied Illinois law to uphold contractual indemnification for negligence of one's own employees. *Spurr v. LaSalle Construction Co.*, 385 F. 2d 322 (7 Cir., 1967); *Bentley v. Palmer House Co.*, 322 F. 2d 107 (7 Cir., 1964).

Contractual indemnification has been not only legal, but common, in Illinois, especially in the construction industry. This was noted by the court in *De Tienne v. S. N. Nielsen Co.*, 45 Ill. App. 2d 231, at 236 (1963), in which it said:

> "Any large construction project involves the simultaneous work of many subcontractors. The workmen employed by contractors and subcontractors necessarily labor in conjunction with or close to one another. The risk of injury is constant. It is not uncommon, particularly in complex structures and high rise buildings, for the contractor and the subcontractors, and the owner, too, to apportion the risk among themselves."

In *De Tienne* the general contractor for a municipal housing project was sued by employees of a subcontractor for personal injuries received while working on the

project. The general contractor settled the claims, then sought reimbursement from the subcontractor under an indemnification provision in their contract. It was stipulated that the accident was caused by employees of the general contractor, over whom the subcontractor exercised no control. Nevertheless, a judgment for the general contractor was affirmed on appeal.

It is not claimed by respondents that such indemnification provisions were illegal or against public policy at the time the K4 contract was executed on June 23, 1967. Although the Illinois General Assembly has since then seen fit to ban indemnification from one's own negligence in the construction and excavating industries by Illinois Rev. Stat. 1973, ch. 29, pars. 61-63, which became effective September 23, 1971, that statute expressly provides that "[t]his Act applies only to contracts and agreements entered into after its effective date." *White v. Morris Handler Co., Inc.*, 7 Ill. App. 3d 199 at 203 (1972), so construes the statute.

As the court declared in *Gay v. S. N. Nielsen Co.*, 18 Ill. App. 2d 368, at 374 (1958):

> "An indemnity contract or contract provision is to be construed like any other contract . . . unless a contract is ambiguous, its meaning must be determined from the words used . . . [citing cases]."

The Illinois Supreme Court stated in *Tatar v. Maxon Construction Co.*, 54 Ill. 2d 64, at 67 (1973):

> "We have examined the authorities cited by the parties and many of those collected at 27 A.L. R. 663, and conclude that the contractual provisions involved are so varied that each must stand on its own language and little is to be gained by an attempt to analyze, distinguish or reconcile the decisions. The only guidance afforded is to be found

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> in the accepted rule of interpretation which requires that the agreement be given a fair and reasonable interpretation based upon a consideration of all of its language and provisions."

And in *Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corp.*, 395 Ill. 429, at 432 (1947) the Illinois Supreme Court has warned:

> "It is a general rule governing the construction of contracts that unless a contract is ambiguous, its meaning must be determined from the words used; and courts will not, because a more equitable result might be reached thereby, construe into the contract provisions that are not therein."

In the case at bar the Court of Appeals appears to have done just that. Because the plain import of the words used in the contract led to a result not to its taste, the court disregarded the unambiguous words of the contractual provision—"which may in any wise accrue against the City in consequence of the granting of this contract or which may in any wise result therefrom"—and read the indemnification provision as though it was limited only to damages resulting from negligent work done under the K4 contract itself.

In *White v. Morris Handler Co., Inc.*, 7 Ill. App. 3d 199 (1972), an indemnification provision in a construction contract was claimed by the defendant to be inapplicable because, at the time of the accident, the employee injured had completed his day's work and was on his way out of the construction site. In rejecting this contention, the court held, (at 203):

> "Entering and leaving the job site must be said to be normal and inherently essential conditions of a contract of this nature since, obviously, the contract cannot be executed by Economy if its workmen were not permitted to enter or leave the job site.

> White was clearly in the performance of an act contemplated by the subcontract at the time of the mishap."

Similarly, the sewer and water pipe work performed by City employees, necessitated as it was by the subway construction, was inherently essential to the execution of the K4 contract, which could not have been carried out without that work having been first performed. The sewer and water pipe work carried out by City employees resulted from the granting of the K4 contract.

To buttress its conclusion, the opinion of the Court of Appeals conjured up the wholly imaginary contingency that enforcing the indemnification provision as written might make the Joint Venture liable for the negligence of "other contractors". There is no such provision in the K4 contract.

The Court of Appeals—and the District Court before it—should have abstained from entering into this controversy, already pending in previously filed, ongoing litigation in the state courts. They should have permitted the Illinois courts to decide the matter according to Illinois law—that is, according to the unambiguous words of the contract.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2373

ROYAL INDEMNITY COMPANY,

Plaintiff,

v.

KENNY CONSTRUCTION COMPANY, a corp., S. A. Healy Co., a corporation, JAMES MCHUGH CONSTRUCTION CO., a corp., d/b/a KENNY-HEALY-MCHUGH, a joint venture; CITY OF CHICAGO, a municipal corp., et al.

Defendants.

FINDINGS OF FACT

and

CONCLUSIONS OF LAW

This cause came on to be heard by the court without a jury, a jury trial having been waived in open court by all of the parties hereto. The court has considered all of the pleadings of all of the parties, all of the evidence adduced by the parties and all of the arguments for all of the parties and hereby makes findings of fact and conclusions of law as hereinafter set forth.

This action arises out of a public works project involving the construction of a segment of the Kennedy Rapid Transit System in the center of an old city thoroughfare in the City of Chicago, commonly known as Milwaukee Avenue.

Plaintiff Royal Indemnity Company ("Royal") here seeks a declaration that it is not obligated under its policy of insurance to defend or indemnify Kenny Construction Company, S. A. Healy Co. and James McHugh Construction Co., d/b/a Kenny-Healy-McHugh, a joint venture ("defendant contractors" or "joint venture"), or defendant, the City of Chicago ("City"), in lawsuits brought by other of the defendants herein ("additional defendants") in the Circuit Court of Cook County for damages to structures along the right of way of the subway installation.

The City has counterclaimed for a declaration that Royal's policy does afford coverage of the Circuit Court lawsuits. The City also has cross-claimed against the joint venture, and it seeks a declaration that the Circuit Court lawsuits are within an indemnity provision contained in the construction contract between the City and the joint venture.

Prior to the conclusion of the trial, plaintiff Royal filed an amendment to its Third Amended Complaint for Declaratory Judgment, adding a Count VII thereto. The defendant contractors and the defendant City were given leave to plead to the amendment within 10 days; they thereafter did so plead; and plaintiff replied.

At the conclusion of the trial, the court orally made the following statement, which statement is adopted and included as part of its findings and conclusions:

> "It is my judgment, as far as the evidence is concerned in this case, that the City simply made a terrible mistake in its sewer work and its water work, and took no precautions at all, and they cannot pass that on to the contractors, because there just is no evidence that I see that the contractors' work contributed to this [damage]. We have no experts saying, 'Listen, here is my opinion about this.

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> My opinion is that this dipping of the buildings, and damage caused to them, was caused by the work.'
>
> "On the other hand, the evidence all seems to me to be that the contractors properly secured their excavations and did everything that was reasonable, and that this [damage] would have occurred had they not even done a bit of work toward their contract. If they had defaulted on their contract, the evidence indicates to me that these damages to these buildings would have occurred, and it was solely the fault of the City for taking no actions."

The court thereafter directed counsel for plaintiff and the defendant contractors to prepare and submit proposed findings of fact and conclusions of law applicable to this case. Time was given all defendants to object thereto. It appears that thereafter Royal and the Kenny-Healy-McHugh joint venture could not agree upon joint proposed findings and conclusions, reflecting the court's view, and Royal and the joint venture each submitted proposed findings and conclusions reflecting their respective positions. The court, therefore, is not adopting the proposed findings and conclusions as they were submitted. Meanwhile, defendant Charles H. Borowsky objected to the proposed findings and conclusions, as did the City which included with its objections suggested additional and supplemental findings and conclusions. Although the court has read and considered the objections of Charles H. Borowsky and the City, it now considers them as moot as the findings and conclusions being entered herein are those of the court. The Court in addition to its oral statement, set forth above, now further finds and concludes:

Findings of Fact

1. In January 1968, defendant City of Chicago awarded a contract for a segment of subway construction to defendants Kenny-Healy-McHugh, a joint venture comprised of defendants Kenny Construction Company, S. A. Healy Co. and James McHugh Construction Co. The contract, entitled KENNEDY RAPID TRANSIT PROJECT ILL-UTG-2, SUBWAY STRUCTURE, LOGAN BOULEVARD TO WOODARD STREET, CONTRACT K-4 ("Contract K-4") is dated March 18, 1968.

2. "General Description of the Work" to be performed is set forth in Contract K-4 as:

> "The work to be done under this contract consists of the furnishing of all labor, materials, plant, equipment, and incidentals and performing all operations necessary to construct approximately 2,560 lineal feet of subway and all appurtenant and collateral work in accordance with the Contract Documents. The work will be constructed in open cut."

3. Plaintiff Royal is a New York Corporation, having its principal place of business in New York. None of the defendants are citizens of the State of New York. Royal is engaged in the insurance business in the State of Illinois.

4. In mid-March of 1968 Royal issued a certain policy of insurance numbered RTG 16 44 68, for a policy term March 18, 1968 to June 1, 1969, to the joint venture as the named insured and to the City as additional insured affording, among other things, Comprehensive General Liability Insurance and Contractual Liability Insurance.

5. Under the Contractual Liability Coverage of said policy Royal agrees to:

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". . . pay on behalf of the insured all sums which the insured, by reason of contractual liability assumed by him under any written contract of the type designated in the schedule for this insurance, shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . ."

6. Under the Comprehensive General Liability Insurance coverage of the said policy, Royal agrees:

"The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of Coverage A. bodily injury or Coverage B. property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . ."

7. "Occurrence" is defined in Royal's policy as follows:

"occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured;"

8. Endorsement No. 3 in the policy further provides that:

"It is agreed that coverage hereunder is limited to work being done by the named insured for the City of Chicago under the project known as project Ill.-UTG-2 Contract K-4, Kennedy Rapid Transit Project, Logan Blvd. and Milwaukee Ave."

9. Before the joint venture commenced its construction under Contract K-4, the City undertook to relocate water and sewer lines from the center of Milwaukee Avenue and to replace the water and sewer lines underneath the sidewalks running in front of buildings along Milwaukee Avenue.

10. The City's sewer and water departments drew the plans for the relocation work and the City's employees were engaged in the work.

11. The relocation work involved the breaking up of the existing sidewalk and the excavation of a trench approximately 6 feet across to a depth of 11 or 12 feet, the laying of the sewer in a bed of stones and then backfilling with sand. In those areas where a water line was placed over a sewer line, the original excavation was reopened to a depth of 5-1/2 to 6 feet, a week or two after the sewer had been put in, and then the water lines were installed and the excavation again backfilled with sand and a temporary asphalt sidewalk installed. In those areas where only the water lines were relocated, there was only one excavation to a 5 to 6 feet depth.

12. The City's underground construction work for relocation of the water and sewer lines was without benefit of shoring and support for adjacent structures despite the fact the installations were immediately adjacent to the structures. This was contrary to well-known engineering principles and construction methods, requiring extreme caution and care to prevent damage to such structures under the circumstances.

13. The water and sewer forces of the City did their work in the 2600 and 2700 blocks of Milwaukee Avenue during April and May, 1968. The first construction work

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by the joint venture, namely the augering for the placing of so-called soldier piles, was performed in June 1968.

14. In performing its work of excavation for the installation of the water and sewer lines, the City did not exercise due care and failed to take reasonable precautions as required by the provisions of an act entitled "An Act to prescribe the duty of an owner or occupant of lands upon which excavations are made in reference to the furnishing of lateral and subjacent support to adjoining lands and structures thereon." (Chapter 70, Paragraph 10, Illinois Revised Statutes of 1965). Such failure by the City to exercise due care and to comply with the provisions of Chapter 70, Paragraph 10 aforesaid, constitutes negligence and a tort; and such excavation, failure to exercise due care and to comply with the provisions of said statutes, is negligence, and was the sole proximate cause of any damage to the buildings and structures as complained of in the actions and suits as alleged in the Third Amended Complaint herein.

15. Before the joint venture began its construction work, damages to the buildings in the 2600 and 2700 block of Milwaukee Avenue were noted and the joint venture advised the City it would not accept liability for any damages caused by the work of the City forces. However, the City directed the joint venture to proceed with its work and it did so in accordance with the plans, drawings and specifications prepared by the City.

16. As the court said in its oral statement at the conclusion of the trial, the work of the joint venture did not cause the damage to the buildings along Milwaukee Avenue and if the joint venture had done no work at all, the same damage would have occurred.

17. Subsequent to the work of the City in the relocation of the water and sewer lines and the work of the joint venture in constructing the subway called for in Contract K-4, the following litigation was instituted in the Circuit Court of Cook County, Illinois:

a. American National Bank and Trust Company of Chicago, as Trustee under Trusts numbered 11152, 11153 and 12059, filed suit under case No. 69 CH 1159. A true and correct copy of the complaint filed in said cause is attached to Royal's complaint for Declaratory Judgment as Exhibit B, and is in evidence as Royal's Exhibit 101a. As more fully appears from said Exhibits, the Trustee Bank originally sought an injunction requiring the City to replace the said backfill used in the utility trench dug in front of 2715-2727 Milwaukee Avenue, 2731-2739 Milwaukee Avenue and 2663-2669 Milwaukee Avenue and enjoining the joint venturers from further work until stable backfill had been substituted. By an Amended Complaint filed August 31, 1970, a Count II was asserted by the Trustee Bank against the City of Chicago, only, claiming monetary damages for alleged taking of private property without just compensation in contravention of Section 13 of Article II of the Illinois Constitution of 1870. Cause No. 69 CH 1159 was dismissed for want of prosecution, but order of dismissal was vacated; the City of Chicago appealed from the order vacating the dismissal and then abandoned its appeal. In November, 1973, the joint venturers were dismissed as parties defendant in the suit, which was set for hearing against the City of Chicago, only, before Cook County Circuit Court Judge Daniel Covelli on April 25, 1974.

Following appeal by the City from the order vacating the dismissal of Cause No. 69 CH 1159, the Trustee Bank filed suit number 73 L 6305. That suit is dormant; the City of Chicago has filed a Motion to Dismiss on the ground of the action penden-

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cy of the prior suit, but the Motion has not been presented.

b. Oak Park Trust and Savings Bank, as Trustee, and Burton E. Lanski and Iris L. Stein, beneficial owners of the trust property which is located at 2747-2765 North Milwaukee Avenue filed suit against the City and the joint venturers under case No. 69 CH 1823, seeking an injunction against prosecution by the City of a building violation suit filed under case No. 69 CH 51248 and seeking to recover for damages to the property. The City of Chicago filed a counterclaim for indemnity against the joint venturers raising the same issues as are presented in the City's cross-claim in this cause, and thereafter, on September 8, 1972, entered into a stipulated judgment which provided that the plaintiffs' Trustee and beneficiaries would recover the sum of $320,000 from the City.

c. Lee Optical Company of Missouri filed suit against the City of Chicago and the joint venturers under case No. 69 L 1132, seeking to recover for alleged damages to its leasehold interests, Lee Optical Company being a tenant in the Lanski Building. On January 31, 1973, Lee Optical Company proved up an agreed $13,750 judgment against the City which was "without prejudice to the right of the Defendant City . . . to file its Third-Party action or Complaint against the joint venturers."

d. Harris Trust and Savings Bank Trust number 7063. Continental Illinois National Bank and Trust Company of Chicago, Executor under the Will of Alex Flicht, Deceased, and Leo Flicht filed suit against the City of Chicago and the joint venturers under case No. 70 L 13376, seeking to recover damages to the premises at 2701-9 North Milwaukee Avenue.

e. Charles H. Borowsky filed suit against the joint venturers under case No. 72 L 2493 seeking to recover damages allegedly sustained to his property located at 2634 North Milwaukee Avenue.

f. Paramount Theatre Building Corporation filed suit against the City and the joint venturers seeking to recover damages allegedly sustained to its property at 2638-2650 North Milwaukee Avenue.

g. LaSalle National Bank as Trustee under Trust No. 39719 and the beneficiaries of that trust, William, Panagiota, Vaselios and Angeline Vaselopulos, filed suit against the City and the joint venturers, under case No. 73 L 2743, seeking to recover damages allegedly sustained to their property at 2658-2664 Milwaukee Avenue.

18. Each of the above named plaintiffs in the lawsuits pending in the Circuit Court of Cook County have been made parties defendant herein and were served with summons herein.

19. In each of the underlying suits, Royal has provided a defense subject to Reservation of Rights for the joint venturers. The defendant contractors are also represented in these underlying lawsuits by their personal attorneys.

20. Royal is entitled to have all of these additional defendants restrained from proceeding against the joint venture contractors in the underlying Circuit Court lawsuits and to have these additional defendants restrained from making any further claims or instituting any further suits against the joint venturers growing out of the work performed by the City which caused the damages, if any, complained of in the Circuit Court lawsuits.

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Conclusions of Law

1. This court has jurisdiction over all of the parties hereto and the subject matter hereof.

2. The damages complained of in the underlying Cook County Circuit Court lawsuits, if any, were caused by the sewer and water line relocation work undertaken by the City and performed by its own work force prior to the commencement of construction work by the joint venture under Contract K-4.

3. The damages complained of in the underlying Cook County Circuit Court lawsuits, if any, did not accrue against the City of Chicago in consequence of the granting of Contract K-4, or in anywise result therefrom.

4. The contractors and/or joint venture are not legally obligated to defend or indemnify the City of Chicago, its agents, officials and employees, against any damages, claims, expenses, costs or judgments recovered by any of the plaintiffs in any of the underlying Cook County Circuit Court lawsuits.

5. Judgment should be entered herein in favor of the contractors and/or joint venture and against the City on the cross-claim of the City against them at the City's costs.

6. The damages complained of in the underlying Cook County Circuit Court lawsuits, if any, did not result from work being done, negligent or otherwise, by the joint venture for the City of Chicago under Contract K-4 within the meaning of Endorsement No. 3 in the policy issued by Royal and, therefore, said policy does not afford insurance to the City for such damages.

7. Royal is under no obligation to undertake any defense of the City nor under any obligation to satisfy judgments against the City with respect to any work performed by the City which caused the damages complained of in the underlying Cook County Circuit Court lawsuits, if any.

8. The contractors and/or joint venture did not breach any policy condition and are entitled to the coverage recited in the policy of insurance issued by Royal in March 1968.

9. Royal is not obligated to pay the costs, expenses and attorneys' fees incurred by the contractors or joint venture in their defense of the aforementioned Circuit Court lawsuits as it appears Royal has provided a good faith defense for them in the underlying suits under the Reservation of Rights.

10. Royal is obligated, however, to reimburse the contractors and/or joint venture for reasonable attorneys' fees incurred by them in the defense of the instant suit in this court. The court finds and concludes the amount of said reasonable attorneys' fees is $25,000.00. Royal is not obligated to pay any costs of investigation incurred by the contractors and/or joint venture as these costs were incurred in the underlying suits in the state court in cases where the contractors and/or joint venture were sued for amounts in excess of the policy limits.

11. Royal is entitled to have all of the additional defendants herein restrained from proceeding against the contractors and/or joint venture in any of the underlying Circuit Court lawsuits in which the contractors are defendants; and Royal is entitled to have the additional defendants restrained from making any claims or instituting any further lawsuits against the contrac-

tors and/or joint venturers growing out of the work performed by the City which caused the damages complained of in the underlying lawsuits, if any.

12. The contractors and/or joint venturers are entitled to have the City of Chicago restrained and enjoined from filing or maintaining any counterclaim, cross-claim or other action for indemnity against them under provisions of Contract K-4 in any of the underlying suits now pending in the Circuit Court of Cook County, Illinois, and in any suit which may be filed as a result of the work performed by the City in relocating the water and sewer lines.

13. Judgment should be entered in favor of Royal and against the City to the extent herein provided in these findings of fact and conclusions of law and defendant City should take nothing by its counterclaim and the same should be dismissed with prejudice at the counter-plaintiff's costs.

14. The findings of fact and conclusions of law entered herein shall in no way prejudice the claim of defendant Charles H. Borowsky, if any, against the City of Chicago but only his claim or the claim of the City of Chicago to be reimbursed or compensated by plaintiff Royal or the joint venturers on account of any judgment he may recover, if any, against the City of Chicago.

15. Any findings of fact entered herein which may properly be construed, in whole or in part, as a conclusion of law shall be deemed as if set forth under "Conclusions of Law" herein.

ENTER:

/s/ J. S. Perry
Judge

Dated: June 6, 1974

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2373

ROYAL INDEMNITY COMPANY,

Plaintiff,

v.

KENNY CONSTRUCTION COMPANY, a corp., S. A. HEALY CO., a corporation, JAMES MCHUGH CONSTRUCTION CO., a corp., d/b/a KENNY-HEALY-MCHUGH, a joint venture; CITY OF CHICAGO, a municipal corp., et al.

Defendants.

DECLARATORY JUDGMENT

and

DECREE

This cause having been tried before the court without a jury, and the court having made and entered simultaneously herewith its findings of fact and conclusions of law, in accordance therewith, the court does hereby enter the following as its final declaratory judgment and decree herein:

It is ORDERED, DECLARED and ADJUDGED that:

1. Plaintiff Royal Indemnity Company is not liable under policy number RTG-16 44 68 to defend or to indemnify the defendant City of Chicago against any costs, attorneys' fees, expenses incurred or to be incurred, or judgments entered or which may be entered against the City of Chicago in the following lawsuits now pending in the Circuit Court of Cook County, Illinois:

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(a) Cause No. 69 CH 1159 and Cause No. 73 L 6305, both entitled *American National Bank And Trust Company Of Chicago, a national banking association, as trustee under the provisions of a trust agreement dated June 17, 1955, and known as trust number 11152; American National Bank And Trust Company Of Chicago, a national banking association, as trustee under the provisions of a trust agreement dated June 17, 1955, and known as trust number 11153; and American National Bank And Trust Company Of Chicago, a national banking association, as trustee under the provisions of a trust agreement dated August 29, 1956, and known as trust number 12059,* Plaintiffs (Defendants herein) v. *City of Chicago, a municipal corporation; Kenny Construction Company, a corporation; James McHugh Construction Co., a corporation; and S. A. Healy Company, a corporation,* Defendants;

(b) Cause No. 69 CH 1823, entitled *Oak Park Trust And Savings Bank, a corporation, as successor in trust to Harris Trust and Savings Bank, the trustee under the provisions of a trust agreement dated September 15, 1961, and known as trust number 30453, Burton E. Lanski and Iris L. Stein,* Plaintiffs (Defendants herein) v. *City of Chicago, a municipal corporation; Kenny Construction Company, a corporation; James McHugh Construction Co., a corporation; and S. A. Healy Company, a corporation,* Defendants;

(c) Cause No. 69 L 11321, entitled *Lee Optical Of Missouri, Inc.,* Plaintiff (Defendant herein) v. *City of Chicago, a municipal corporation, Kenny Construction Company, a corporation, James McHugh Construction Co., a corporation, and S. A. Healy Company, a corporation,* Defendants;

(d) Cause No. 70 L 13376, entitled *Harris Trust And Savings Bank, Trust number 7063, Continental Illinois National Bank and Trust Com-*

pany of Chicago, Executor under the Will of Alex Flicht, Deceased, and Leo Flicht, Plaintiffs (Defendants herein) v. *City of Chicago, a Municipal Corporation; Kenny Construction Company, a Corporation; James McHugh Construction Co., a Corporation; and S. A. Healy Company, a corporation,* Defendants;

(e) Cause No. 72 L 2493, entitled *Charles H. Borowsky,* Plaintiff (Defendant herein) v. *Kenny Construction Company, a corporation, James McHugh Construction Co., a corporation, and S. A. Healy Company, a corporation,* Defendants;

(f) Cause No. 73 L 2637, entitled *Paramount Theatre Corporation, an Illinois corporation,* Plaintiff (Defendant herein) v. *City of Chicago, a municipal corporation, Kenny Construction Company, a corporation, James McHugh Construction Co., a corporation, and S. A. Healy Company, a corporation,* Defendants, and

(g) Cause No. 73 L 2743, entitled *La Salle National Bank, as trustee under a trust agreement known as Trust No. 39719, William S. Vaselopulos, Panagiota Vaselopulos, Vaselios C. Vaselopulos and Angeline Vaselopulos,* Plaintiffs (Defendants herein) v. *City of Chicago, a municipal corporation, Kenny Construction Company, a corporation, James McHugh Construction Co., a corporation, and S. A. Healy Company, a corporation,* Defendants.

2. Cross-defendants Kenny Construction Company, S. A. Healy Co., James McHugh Construction Co., individually or d/b/a Kenny-Healy-McHugh, a joint venture, are not liable under the terms and provisions of Contract K-4 to defend or indemnify cross-plaintiff City of Chicago for damages caused by work performed by the said City's work force.

3. Cross-defendants Kenny Construction Co., S. A. Healy Co., James McHugh Construction Co., individually or d/b/a Kenny-Healy-McHugh, a joint venture, are not liable under the terms and provisions of Contract K-4 to indemnify cross-plaintiff City of Chicago against any costs, attorneys' fees, expenses incurred or to be incurred or judgments entered or which may be entered in any of those lawsuits now pending in the Circuit Court of Cook County, Illinois, mentioned in paragraph 1 hereof.

4. The defendant City of Chicago is ordered and directed to forthwith dismiss its counterclaim filed on April 25, 1972 in the Circuit Court of Cook County and now pending there as case No. 69 CH 1823.

5. Cross-plaintiff City of Chicago is hereby restrained and enjoined from filing or maintaining any counterclaim, cross-claim or other action for indemnity against Kenny Construction Company, S. A. Healy Co., James McHugh Construction Co., individually or d/b/a Kenny-Healy-McHugh, a joint venture, under the provisions of Contract K-4 in any of the litigation now pending in the Circuit Court of Cook County, Illinois, as recited in paragraph 1 hereof.

6. The damages complained of in the underlying Cook County Circuit Court lawsuits, if any, were caused by the sewer and water line relocation work force prior to the commencement of construction work by the joint venture under Contract K-4; and the said damages complained of in the state court lawsuits, if any, did not accrue against the City of Chicago in consequence of the granting of Contract K-4, or in anywise result therefrom.

7. The additional defendants herein named as plaintiffs in the underlying lawsuits mentioned in paragraph

1 hereof are hereby restrained and enjoined from proceeding against Kenny Construction Company, S. A. Healy Co. and James McHugh Construction Co., individually or d/b/a Kenny-Healy-McHugh, a joint venture, in any of the lawsuits now pending in the Circuit Court of Cook County, Illinois, as recited in paragraph 1 hereof, and said additional defendants are hereby further restrained and enjoined from making any claims or instituting any further lawsuits against the said contractors and/or joint venture growing out of the work performed by the City which caused the damages complained of in the underlying lawsuits, if any.

8. Judgment is hereby entered in favor of cross-defendants Kenny Construction Company, S. A. Healy Co., James McHugh Construction Co., individually and d/b/a Kenny-Healy-McHugh, a joint venture, on the cross-claim filed herein by cross-plaintiff City of Chicago, and it is ordered that said cross-plaintiff City of Chicago take nothing by said cross-claim and that the same is hereby dismissed, with prejudice and at said cross-plaintiff's costs.

9. The contractors and/or joint venture did not breach any policy condition and are entitled to the coverage recited in the policy of insurance issued by Royal in March 1968.

10. Royal is not obligated to pay the costs, expenses and attorneys' fees incurred by the contractors and/or joint venture in their defense of the underlying Circuit Court lawsuits as Royal provided a good faith defense for them in the underlying suits.

11. Royal is obligated to reimburse and [sic] contractors and/or joint venture for reasonable attorneys' fees incurred by them in the defense of the instant suit in this court and said contractors and/or joint venture shall

BLEED THROUGH

have and recover the sum of $25,000.00 from Royal for said reasonable attorneys' fees. Royal is not obligated, however, to reimburse the contractors and/or joint venture for costs of investigation.

12. Judgment is hereby entered in favor of Royal Indemnity Company to the extent provided in the court's findings of fact and conclusions of law, being entered simultaneously herewith.

13. Counter-plaintiff City of Chicago shall take nothing by its counterclaim herein against Royal Indemnity Company and said counterclaim is hereby dismissed with prejudice at counterclaimant's cost.

14. The findings of fact and conclusions of law entered herein, simultaneously herewith, in no way prejudice the claim of defendant Charles H. Borowsky, if any, against the City of Chicago but only his claim or the claim of the City of Chicago to be reimbursed or compensated by plaintiff Royal or the contractors and/or joint venturers on account of any judgment he may recover, if any, against the City of Chicago.

ENTER:

/s/ J. S. Perry
Judge

Dated: June 6, 1974

APPENDIX C

In the
United States Court of Appeals
For the Seventh Circuit

No. 74-1738

ROYAL INDEMNITY COMPANY,
Plaintiff, Counter-Defendant-Appellee,
v.
KENNY CONSTRUCTION COMPANY, ET AL.,
Defendants, Counter-Defendants-Appellees, and
CITY OF CHICAGO, a municipal corporation,
Defendant, Counter-Plaintiff-Appellant.

No. 74-1739

ROYAL INDEMNITY COMPANY,
Plaintiff, Counter-Defendant-Appellant,
v.
KENNY CONSTRUCTION COMPANY, ET AL.,
Defendants, Counter-Defendants-Appellees, and
CITY OF CHICAGO, a municipal corporation,
Defendant, Counter-Plaintiff-Appellee.

ROYAL INDEMNITY COMPANY,
Plaintiff, Counter-Defendant-Appellee,

v.

KENNY CONSTRUCTION COMPANY, a corporation,
S. A. HEALY Co., a corporation, and
JAMES MCHUGH CONSTRUCTION, a corporation, d/b/a
KENNY-MCHUGH, a joint venture, [sic]
Defendants, Counter-Defendants-Appellants, and

CITY OF CHICAGO, a municipal corporation,
Defendant, Counter-Plaintiff-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 70 C 2373
JOSEPH SAM PERRY, *Judge.*

ARGUED SEPTEMBER 26, 1975 — DECIDED DECEMBER 15, 1975

Before CUMMINGS and TONE, *Circuit Judges*, and KUNZIG,* *Judge.*

KUNZIG, *Judge*: In this indemnity action plaintiff insurer, Royal Indemnity Co. (Royal), brings a declaratory judgment action (based on diversity)[1] against its insured, a joint venture, composed of Kenny Construction Co., S. A. Healy Co., and James McHugh Construction Co. (the Venture), against the City of Chicago (the City) and against various Chicago property owners (owners). Royal seeks a judgment that it is not liable for various items of

* Judge Robert L. Kunzig of the United States Court of Claims is sitting by designation.

[1] 28 U.S.C. § 2201 (1971) provides:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

damage incurred by owners as a result of subway construction work by the City and the Venture. Royal also asks that defendants owners be enjoined from pursuing Cook County court action against it. The Venture seeks attorney's fees for its participation in this action.

The City counterclaimed against Royal contending that Royal should be held liable as indemnitor for all damages incurred by owners. The City also cross-claimed, alleging alternatively that the Venture should be held liable for all damages suffered. Finally, the City claimed a right to recover attorney's fees.

The district court found for Royal on its claim and held that the insurer was not liable to owners, the City or the Venture for any damages stemming from the subway construction. It further found that the City, if anyone, had negligently performed its construction duties and therefore denied the City's counterclaim against Royal and its cross-claim against the Venture, including the claim for attorney's fees. However, for reasons it did not explain, the court awarded the Venture $25,000 in attorney's fees against Royal.

We affirm the lower court determinations as to the responsibility of Royal, the Venture and the City in conjunction with the construction damages incurred by owners. We reverse the award of attorney's fees.

1. Facts

a. *The contracts*

On March 21, 1968, the Venture pursuant to an advertisement for bids by the City was awarded a contract to construct a portion of the proposed Kennedy Rapid Transit extension. Under the contract, the Venture was to construct approximately 2560 feet of subway under Milwaukee Avenue on the Chicago North Side (the K-4 contract). The contract contained a clause requiring the Venture to procure liability insurance for any claims arising from this contract. (K-4 contract, pp. SC-3, 4.) The contract contained another provision for coordination of additional work (p. GC-6). And, the K-4 contract contained an indemnity provision (p. GC-4).

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Indemnity

Contractor shall indemnify, keep and save harmless, the City . . . . . against all injuries, deaths, loss, damages, claims, patent claims, suits, liabilities, judgments, costs and expenses, *which may in anywise accrue against the City in consequence of the granting of this contract or which may in anywise result therefrom*, whether or not it shall be alleged or determined that the act was caused through negligence of the Contractor or his employees, of the subcontractor or his employees, if any, *or of the City of Chicago* or its employees. . . . (emphasis added).

The Venture subsequently on March 18, 1969 entered into an insurance contract with Royal under which Royal *insured* for three years claims arising from the K-4 contract. The Venture was listed as a named insured and the City as an additional insured. *The insurance contract expressly limited its coverage to work done under the K-4 contract.*

It is agreed that *coverage hereunder is limited to work being done by the named insured for the City of Chicago* under the project known as Project Ill. —UTG-2 Contract K-4, Kennedy Rapid Transit Project, Logan Blvd. and Milwaukee Ave. (emphasis added).

b. *Construction activity*

Before any construction by the Venture could begin on the subway, existing water and sewer pipes had to be relocated. The City undertook this relocation and moved the pipes to a position under the sidewalk on the east side of Milwaukee Avenue. This relocation began in April 1968 and was completed in May 1968.

The first work performed by the Venture under the K-4 contract (although it had offices in the area since March 22, 1968) was the "augering" of holes for "soldier piles" by a subcontractor for the Venture. No subway construction occurred until after the City had finished the water and sewer pipe relocation. The augering began in June 1968. The excavation for the subway was made

August 13-August 18. From September 13-October 24, the concrete base was poured; and from October 31-January 20, 1969, the walls were poured. The permanent roof for the subway was installed between November 1, 1968 and January 30, 1969.

c. *Damage*

During the work on the K-4 segment, it became apparent that various buildings along Milwaukee Avenue had suffered damage as a result of construction activity. The most serious damage occurred to a structure known as the Lanski Building which had to be demolished in 1969, allegedly as a result of the subway project. Other property owners suffered lesser amounts of damage.

d. *State court lawsuits*

Seven separate lawsuits were filed in the Circuit Court of Cook County, Ill. between 1969 and 1973 against the City and the Venture.[2] In these actions, Milwaukee Avenue property owners sought to recover losses sustained as a result of the subway construction. The City and the Venture made a demand on Royal to defend these lawsuits under the provisions of the insurance agreement. Rather than defend seven separate actions in which it believed it had no liability, Royal instead brought this declaratory judgment action.

The district court found that the property damage had occurred solely as a result of negligence by the City in moving the water and sewer pipes. It determined that this activity took place *outside* the K-4 contract. Therefore, the Venture was not liable to the City under the K-4 indemnity provision and Royal was not liable because the insurance contract was limited to damages arising from K-4 contract activity. The district court held for Royal against all defendants on the property

[2] *American National Bank v. City of Chicago*, Nos. 69 CH 1159 and 73 L 6305. *Oak Park Trust and Savings Bank v. City of Chicago*, Nos. 69 CH 1823 and 51248. *Lee Optical Co. v. City of Chicago*, No. 69 L 11321. *Continental Illinois Nat'l Bank and Trust Co. v. City of Chicago*, No. 70 L 13376. *Charles Borowsky v. Kinney* [sic] *Construction Co.*, No. 72 L 2493. *LaSalle Nat'l Bank v. City of Chicago*, No. 73 L 2743. *Paramount Theatre Building Corp. v. City of Chicago*, No. 73 L 2637.

damage liability question. It denied the City's counterclaim against Royal and the cross-claim against the Venture, but it granted an award of attorney's fees to the Venture against Royal.

The City appeals the decision below in which the district court found for Royal in the declaratory judgment action and also, the denial of the City's counterclaim and cross-claim. It further seeks to recover attorney's fees for work done in all phases of this litigation. Royal appeals the award of attorney's fees to the Venture. Finally, the Venture cross-appeals the attorney fee award, seeking greater amounts.

2. The City's Appeal

The City appeals the lower court decision asserting four bases for reversal: (1) the Venture, rather than the City caused the damage to the structures during its work on the subway; (2) the relocation work was within the K-4 contract and the indemnity provision makes the Venture and therefore Royal (through its insurance contract) liable to the City whether the City's or the Venture's negligence caused the damage; (3) the City in moving the water and sewer pipes was a *subcontractor* of the Venture, within the K-4 contract and thus entitled to indemnification; and (4) the City is entitled to attorney's fees for its pursuit of this litigation in both the state and district courts. We affirm the district court's decision in the declaratory judgment action for Royal against the City and the ruling against the City on the counterclaim and cross-claim. We also hold that the court below properly denied the City's claim for attorney's fees.

First, the City caused the property damage which is the basis of this lawsuit. The district court's finding that the cause of the damage to the structures along Milwaukee Avenue was solely the negligence of the City in relocating the water and sewer pipes is a finding of fact. *Wallner* v. *Kitchens of Sara Lee, Inc.*, 419 F.2d 1028, 1033 (7th Cir. 1969); *Bolander* v. *Gypsum Engineering, Inc.*, 87 Ill. App. 2d 325, 231 N.E. 2d 659 (1967). We are convinced that this finding is fully sup-

ported by the evidence.[3] The City undertook to excavate along the sidewalk near the buildings without undertaking proper precautionary shoring measures. The record adequately illustrates that a great deal, if not all of the damage, had taken place before the Venture's construction even began. We therefore affirm the district court determination that the City's negligence caused the damage which is the subject of this lawsuit.

Second, the trial court determined that this relocation work took place *outside* the K-4 contract. Therefore, reasoned the district court, the K-4 indemnity clause did not apply to create liability by the Venture, and the insurance agreement limited to damages arising from the K-4 contract did not apply to create any liability of Royal to the City. Plaintiff contends that such a conclusion is erroneous. We agree with the lower court.

Resolution of whether the subway relocation was or was not part of the K-4 contract is a question of interpreting the intent of the parties from the contract as a whole. *United States* v. *Seckinger*, 397 U.S. 203, 213 (1969); *Nice Ball Bearing Co.* v. *M. H. Lescure*, 227 F.2d 118, 120 (7th Cir. 1955). We have carefully studied the K-4 contract and are satisfied that the City's relocation work was activity *specifically withheld* from the K-4 contract.[4] The contract map bears the legend over the sewer work "To be done by others." The price

[3] "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness." Fed. R. Civ. P. 52(a). The proper scope for review of the trial court's factual determination is "whether on the entire evidence . . . [the appellate court] is left with the definite and firm conviction that a mistake has been committed." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

[4] The drawings which were part of the K-4 contract, Exhibits four and five, item 7 under general, specifically show that the sewer work was *reserved for others*. Moreover, there is no indication that the Venture included the cost of the City's sewer work in its bids on the K-4 contract. Significantly, the City's counsel at oral argument, in response to a question by Judge Tone, could not explain how a prospective bidder would know that the water and sewer work was part of the K-4 contract. The K-4 "bid return form" breaks the K-4 project down into 94 specific work and material categories. Thus, rather than submitting a lump sum bid, the contractor bid on the project by bidding on each of the 94 items, then adding the total of the items. Nowhere to be found in the list of the 94 items which the contractor was to have bid on, is the water and sewer work at issue here.

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of the sewer work was not included in the bids requested for the K-4 contract. No sewer plans or specifications for the relocation were contained in K-4. Therefore, the district court properly concluded as a matter of law that the sewer work was excluded from the K-4 contract itself.

However, the City contends, the broad language of the K-4 contract indemnity provision operates to shift responsibility for the City's negligence during preparatory work to the Venture and ultimately to Royal (through the insurance agreement). The indemnity language in question provides:

> "Contractor shall indemnify . . . . the City . . . against all . . . loss . . . which may in anywise accrue against the City in consequence of the granting of this contract or which may in anywise result therefrom, whether or not it shall be alleged or determined that the act was caused through negligence or omission of . . . the City of Chicago or its employees. . . ."

We must discern whether or not the all-inclusive language of this section embraces damages occasioned by work performed by the City both preparatory to the work called for in the K-4 contract *and* excluded from the K-4. We conclude that it does not so operate.

We again start with the proposition that given an ambiguity in the contract, we must determine the intent of the parties at the time the agreement was executed. Although both parties cite cases in which courts have given either an expansive or a narrow interpretation to indemnity agreements,[5] such is not our problem here.

[5] The City cites various cases in which indemnity agreements, some of equal breadth to the one in question here, were upheld and applied. For example, *Tenenbaum* v. *City of Chicago*, 11 Ill. App. 3d 987, 297 N.E. 2d 716 (1973), *rev'd on other grounds*, 60 Ill. 2d 363, 325 N.E. 2d 607 (1975). On the other hand, Royal urges cases upon us in which indemnity agreements were strictly construed. *Eg.*, *Westinghouse Elec. Elevator Co.* v. *LaSalle Monroe Bldg. Corp.*, 395 Ill. 429, 70 N.E. 2d 604 (1947). Since our determination is resolved based upon our conception of the parties' intent, we need not reach rules of indemnity contract construction. However, we note that a contract which purports to relieve the indemnitee of his own negligence will generally be strictly construed and must provide for indemnification in clear and unequivocal terms. *Auto Owners Mut. Ins. Co.* v. *Northern Ind. Pub. Serv. Co.*, 414 F.2d 192 (7th Cir. 1969).

Royal does not argue that the indemnity provision is totally unenforceable. The City does not argue that it extends as far as the words might indicate. The problem then resolves into a process of "line drawing." Does preparatory work performed by the City fall within the language "in consequence of the granting of this contract or . . . in anywise result therefrom" or does it stand outside? We believe, from our reading of the entire K-4 contract, that it falls outside.

The key reason for this conclusion is that *in addition to the K-4 contract* under which the Venture assumed responsibility for building a portion of the Chicago subway, various other contracts were let. The Venture was required under the "Other Contracts" clause of K-4 to cooperate with contractors and City employees who were performing tasks *outside* of the K-4. (K-4, p. GC-6).[6] To hold that the Venture (and therefore Royal) contracted to assume responsibility for negligence or omissions of any of these collateral contractors would obviously be absurd. As we see it, the City in conducting preparatory sewer work was equally a "collateral contractor" with respect to the Venture under the K-4 contract. We, therefore, conclude that the indemnity clause was never intended to extend to such collateral activity,[7] and therefore, does not operate to shift responsibility for the City's negligence to the Venture or to Royal.

Since the sewer work caused the damages at issue and since it was *outside* of the K-4 contract, the Royal insurance agreement (specifically limited to damages

[6] Special condition Section 4 of the K-4 contract further delineates work which proceeded concurrently with the K-4 subway work: Duct line work, median preparation, bridge super-structures, other subway and elevated construction, construction of stations, trackwork, signals and interlocking equipment, power distribution facilities, subway electrical work, and building demolition.

[7] Moreover, should it be necessary to resort to rules of construction to resolve any ambiguity here, we note that because the City drafted the terms of the indemnity clause and since there appeared to be no negotiation over its language, application of the rule of *contra proferentem* is called for. *United States* v. *Seckinger*, 397 U.S. 203, 210 (1970); *Weiland Tool & Mfg. Co.* v. *Whitney*, 44 Ill. 2d 105, 251 N.E. 2d 242, 248 (1969). We reach the same result by applying a strict construction to the terms of the indemnity provision as we do by finding the intent of the parties by evaluating other portions of the K-4 contract.

during operations outside the K-4.
arising from the K-4 contract)[8] equally does not operate to make Royal liable for damages caused by the City

Third, since the relocation work was specifically excluded from the K-4 contract, we fail to see how the City can be termed to have been a subcontractor of the Venture under K-4 in any sense of the word. Subcontractor as used in connection with building contracts refers to "one who takes from the principal contractor a specific part of the work" undertaken by the principal contractor. 17 C.J.S. *Contracts* § 11 (1963). For the City to have been a subcontractor of the Venture, the relocation work would have had to be assumed by the Venture, then subcontracted back to the City's water and sewer department. As we have already determined, this was not the situation as the relocation was specifically excluded from the K-4. Therefore, the City cannot be considered to have been a subcontractor of the Venture, and is not thereby entitled to indemnification.

In short, the district court correctly determined that the City caused the damage to structures in the K-4 area. This damage occurred *outside* of the K-4 contract. The trial judge rightly held for Royal on its declaratory judgment suit and properly ruled against the City on its counter and cross-claims. The trial judge also properly denied the City's additional demand for attorney's fees against Royal. We affirm the lower court's judgment for Royal and the Venture against the City in all respects.

3. Royal's Appeal: Attorney's Fees

Royal cross-appeals the trial judge's award of attorney's fees in favor of the Venture against Royal. The court gave no reason for his award of attorney's fees. However, it would appear as an inference that the trial judge believed it was improper or in bad faith for Royal to have included the Venture as a defendant in this action. We disagree, and therefore reverse the lower court below.

Since this is a declaratory judgment action based upon diversity, Royal's liability for attorney's fees to the Ven-

[8] *See* part 1.a., *supra*.

ture hinges upon Illinois law governing recovery of attorney's fees.[9] The Venture contends that Illinois law provides a valid basis for award of attorney's fees in this case.

However, as recently noted by the United States Supreme Court, the common law rule in this country is that absent statutory authority to the contrary, attorney's fees must be borne by each litigant. *Alyeska Pipeline Service Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975). Illinois common law is to the same effect. *Trust Co.* v. *National Surety Corp.*, 177 F.2d 816, 818-19 (7th Cir. 1949).

But, the Venture contends, Section 41 of the Illinois Civil Practice Act subjects a party to attorney's fees if it sues another party without reasonable cause or in bad faith.[10] The record is silent as to any bad faith findings by the district court, and we are convinced that the Venture has not shown bad faith by Royal in this case. We are bound by the record.

In addition, at the time that Royal brought this declaratory judgment action, it was in the position of defending seven separate state court actions on behalf of the Venture. It was possible at that time that the Venture could have been held liable to property owners for negligence *outside* the K-4 contract and that Royal, as insurer limited to K-4 damages, would not have been liable. It was not bad faith on the part of Royal to seek to bind the Venture by including it in any declaratory judgment action, but rather, sound legal practice.

Further, the declaratory judgment if it is to be effective, must afford as complete a determination as possible

[9] In diversity actions, state law governs. *Erie R.R. v. Thompkins*, 304 U.S. 64 (1938). As a general rule, in contract actions, the law of the place of contracting affords the applicable legal standard. *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942). All parties apparently agree that this question resolves [sic] on an interpretation of Illinois law.

[10] **Section 41 of the Illinois Civil Practice Act, 110 Ill. Rev. Stat. § 41 (1968) provides:**

> **Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial.**

BLEED THROUGH

in multiple party litigation. Since the record is devoid as to any bad faith on the part of Royal and since it was proper for Royal to join the Venture as a party to resolve completely all issues of liability, we reverse the district court award of attorney's fees to the Venture.

In summary, we find that the trial judge correctly found that negligence of the City caused the damage to various property owners which lead [sic] to this lawsuit. The lower court properly concluded that this negligence occurred pursuant to activities outside of the K-4 construction contract between the City and the Venture. Thus, there was no basis for shifting liability from the City to the Venture under the K-4 indemnity provision and therefore no basis for shifting liability to Royal under the insurance policy which was specifically limited to damages resulting from K-4 activity. The district court properly found that the City, not Royal or the Venture, must bear total responsibility for construction property damage. Thus it correctly found in favor of Royal and the Venture against the City on the claim, cross-claim, and counterclaim. However, as it appears that Royal properly and without bad faith joined the Venture as a party, we reverse the trial judge's award of attorney's fees to the Venture.

AFFIRMED IN PART, REVERSED IN PART.

Costs to be taxed against City in No. 74-1738 and against Kenny in No. 74-1739 and No. 74-1786.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 15, 1976

Before

HON. WALTER J. Cummings, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. ROBERT L. KUNZIG, *Judge**

No. 74-1738

ROYAL INDEMNITY COMPANY,

Plaintiff, Counter-Defendant-Appellee,

v.

KENNY CONSTRUCTION COMPANY, ET AL.,

Defendants, Counter-Defendants-Appellees,

and

CITY OF CHICAGO, a municipal corporation,

Defendant, Counter-Plaintiff-Appellant.

No. 74-1739

ROYAL INDEMNITY COMPANY,

Plaintiff, Counter-Defendant-Appellant,

v.

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* Judge Robert L. Kunzig of the United States Court of Claims is sitting by designation.

BLEED THROUGH

KENNY CONSTRUCTION COMPANY, ET AL.,

Defendants, Counter-Defendants-Appellees,

and

CITY OF CHICAGO, a municipal corporation,

Defendant, Counter-Plaintiff-Appellee.

No. 74-1786

ROYAL INDEMNITY COMPANY,

Plaintiff, Counter-Defendant-Appellee,

v.

KENNY CONSTRUCTION COMPANY, a corporation, S. A. HEALY CO., a corporation, and JAMES MCHUGH CONSTRUCTION, a corporation, d/b/a KENNY-MCHUGH, a joint venture,

Defendants, Counter-Defendants-Appellants,

and

CITY OF CHICAGO, a municipal corporation,

Defendant, Counter-Plaintiff-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division — No. 70 C 2373

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

Supreme Court, U. S.
FILED
MAY 13 1976
MICHAEL RODAK, JR., CLERK

75-1483

No. [redacted]3

In the

Supreme Court of the United States

OCTOBER TERM, 1975

CITY OF CHICAGO, a municipal corporation,
Petitioner,

v.

KENNY CONSTRUCTION COMPANY, a corporation, S. A. HEALY COMPANY, a corporation, and JAMES McHUGH CONSTRUCTION COMPANY, a corporation d/b/a KENNY-HEALY-McHUGH, a joint venture, and ROYAL INDEMNITY COMPANY, a corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS, KENNY CONSTRUCTION COMPANY, A CORPORATION, S. A. HEALY COMPANY, A CORPORATION, AND JAMES McHUGH CONSTRUCTION COMPANY, A CORPORATION d/b/a KENNY-HEALY-McHUGH, A JOINT VENTURE, IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-14853

CITY OF CHICAGO, a municipal corporation,

Petitioner,

v.

KENNY CONSTRUCTION COMPANY, a corporation, S. A. HEALY COMPANY, a corporation, and JAMES McHUGH CONSTRUCTION COMPANY, a corporation d/b/a KENNY-HEALY-McHUGH, a joint venture, and ROYAL INDEMNITY COMPANY, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS, KENNY CONSTRUCTION COMPANY, A CORPORATION, S. A. HEALY COMPANY, A CORPORATION, AND JAMES McHUGH CONSTRUCTION COMPANY, A CORPORATION d/b/a KENNY-HEALY-McHUGH, A JOINT VENTURE, IN OPPOSITION

The Respondents, Kenny Construction Company, a corporation, S. A. Healy Company, a corporation, and James McHugh Construction Company, a corporation,

d/b/a Kenny-Healy-McHugh, a joint venture, (hereinafter called "Joint Venture") respectfully prays that this Court deny the prayer of the Petitioner, City of Chicago, a municipal corporation, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding December 15, 1975 (rehearing denied January 15, 1976).

OPINIONS BELOW

The opinion of the Court of Appeals, filed on December 15, 1975, is reported at 528 F. 2d 184 and is reproduced in the Appendix to the Petition for a writ of certiorari. Similarly, the order of the Court of Appeals denying the Petition for Rehearing on January 15, 1976 is reproduced in the Appendix to the Petition.

The findings of fact and conclusions of law of the District Court, entered on June 7, 1974 are unreported but are reproduced in the Appendix to the Petition. Similarly, the Judgment of that Court is unreported but reproduced in the Appendix to the Petition.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Petitioner has set forth five questions in its brief. In addition, the following questions present themselves:

1. Whether an issue not raised in either the District Court or the Court of Appeals may properly be raised in the Supreme Court.

2. Whether a District Court, in the exercise of its diversity jurisdiction, may in a Declaratory Judgement

Action, restrain parties before it from relitigating in state courts issues determined by it in order to effectuate or protect its judgment.

STATEMENT OF THE CASE

Petitioner's statement of the case is essentially correct. However, certain additional facts are necessary.

This action arose as a response to the filing of several state lawsuits alleging that the Petitioner, City of Chicago, and the Respondent Joint Venture had caused damage to their property during the construction of the Milwaukee Avenue Subway. Royal Indemnity Insurance Company (hereinafter called "Insurance Company"), being a New York corporation, filed the instant action in U. S. District Court for the Northern District of Illinois seeking a determination as to whether the damage complained of by the property owners and the activity resulting in that damage were covered under the policy of insurance issued to the Joint Venture. As Defendants, the Insurance Company named the Joint Venture, the City and the Plaintiff property owners in the state cases.

Thereafter, the City filed a counterclaim in the instant case against the Insurance Company alleging that if the City employees caused the damage complained of in the State cases, then by virtue of the indemnity agreement between the City and the Joint Venture in Contract K-4, and the indemnity provision in the insurance policy, the City was entitled to coverage by the Insurance Company. Also, in the instant case, the City filed a cross-claim against the Joint Venture alleging that even if the City caused the damage, then by virtue of the indemnity provision, the City was entitled to indemnification from the Joint Venture.

The City's theory of the case in its cross-claim in the instant lawsuit was the same as it filed against the Joint Venture in the State cases. Thus the city, by its own action in filing the cross-claim and the counterclaim put at issue in the Federal tribunal the issues of indemnity.

In its petition, the City has deliniated certain provisions of Contract K-4, but omitted the following:

> "Other Contracts
>
> "The City may undertake or award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and City employees and carefully fit his own work to such additional work as may be directed by the Commissioner. The contractor shall not commit or permit any action which will interfere with the performance of work by other contractors or by City employees."

Pursuant to this provision, the City undertook to perform itself the relocation of the sewer and water lines. This relocation construction is referred to in the contract documents under the legend "work by others". There is no support in the record for the City's statement in its Petition that the Joint Venture and the City agreed that the relocation work was necessary, and further agreed that the City would undertake the work. No such testimony was ever adduced. The City unilaterally decided to undertake the relocation work itself under the above cited provision of the Contract. At no time did the City ever consult with, much less agree with, the Joint Venture on either the City's decision to relocate the lines itself, or the placement of those lines in the sidewalk areas.

At no point in the contract documents is the relocation construction specified or described except for the

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symbols and legend "work by others". The actual blueprints and working drawings for both the sewer and water relocations were contained in City drawings made by City engineers and used by City employees. The Joint Venture had absolutely nothing to do with the relocation of the lines since Contract K-4 had nothing to do with the relocation of those lines.

The City forces, in relocating the sewer lines, undertook to excavate trenches in the sidewalk area of Milwaukee Avenue. These trenches varied in depth to a level of 12 feet and a width of six feet. The excavations were, in some cases, immediately adjacent to building foundations and were undertaken without any shoring designed to maintain the lateral support of the buildings.

During the time the City was excavating its trenches for the relocation, several of the buildings along the City construction site began to settle. One of the buildings, the property of one Lanski, a Plaintiff in a state case, suffered a cave-in of soil underlying its foundation while the City was excavating its sewer trench so close to the building that its foundation was exposed. The subsidence continued during the time the Joint Venture undertook its main excavation.

Contrary to statements in the City's petition, the Joint Venture completely shored its excavation. The construction procedure required by the contract and followed by the Joint Venture called for the erection of "soldier pile line". Briefly, this technique called for the contractor to auger a series of holes twenty feet apart along the construction right of way. Into these holes, "I" beams were placed, and concrete was poured to solidify the beam in place. After the street was broken up, the Joint Venture would then backhoe to a depth of

2½ to 3 feet. Metal sheeting and timbers were placed laterally from "I" beam to "I" beam before any further excavation was undertaken. At all times, the Joint Venture shored and braced its excavation. The effect of this shoring was to construct a retaining wall that supported the adjacent soil, protected the men working in the excavation, and maintained the structural integrity of adjoining properties.

During the course of the Joint Venture's excavation, the sublateral soil integrity was maintained throughout, and in the testimony of the only expert offered at the trial by any party, this excavation did not contribute to the subsidence affecting the structures along the right of way. The only expert testimony on this issue concluded that the sole cause of the damage to the buildings complained of in the state cases was the sewer and water relocation work performed by the City. The expert further stated that there was no causal connection whatsoever between the building's subsidence and the Joint Venture's excavation work.

ARGUMENT

I.

THE PETITIONER IS PRECLUDED FROM RAISING ISSUES IN ITS PETITION WHICH IT DID NOT RAISE IN EITHER THE DISTRICT COURT OR THE COURT OF APPEALS.

In this Court, the City seeks to raise for the first time the propriety of the District Court's enjoining certain defendants from proceeding against the Joint Venture in state court proceedings. At no time did the City raise this issue in the District Court either by means of a motion or in any other manner. Neither did the City assign the issuance of the restraining order as error to the Court of Appeals, nor was the issue briefed or argued in that Court.

It is a fundamental principle, repeatedly declared, that this court will not entertain issues not raised in the Court of Appeals. The City should not be heard now to urge any issue that was not presented in any form either to the District Court or to the Court of Appeals. In *Duignan* v. *United States, et al.*, 274 U.S. 195 (1926), this Court stated "This court sits as a court of review. It is only in exceptional cases coming here from the Federal courts that questions not pressed or passed upon below are reviewed." (274 U.S. 200). What constitutes an "exceptional" case is discussed in *Silber* v. *United States*, 370 U.S. 717 (1962). That case points out that this Court can always notice "plain error". The Court also stated that "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or

if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." (370 U.S. 718). Certainly, no such situation is presented to this court by the City's urging in its petition a violation of the Federal Anti-Injunction Statute (28 USC Sec. 2283).

Indeed, in *McCullough* v. *Kammerer Corp., et al.*, 323 U.S. 327 (1945), this court dismissed a Writ of Certiorari which it had previously granted because "the grounds asserted for the allowance of certiorari are inadequately supported by the record." This was true, the court said, because "the only question for which we granted certiorari is one not properly raised, litigated or passed upon below" (323 U.S. 328). The same circumstances obtained in the instant case. The City seeks to raise for the first time in the Supreme Court of the United States an issue never discussed in any form whatever in any forum below. As will be seen in our later discussion of the Anti-Injunction Statute, the trial court's action was perfectly proper. But it is a cardinal principle in appellate jurisprudence that the trial courts and intermediate Courts of Appeal should have an opportunity to pass on all issues. The Anti-Injunction Statute point certainly does not constitute plain error in any case and, indeed, in the instant case, the issuance of the injunction by the trial court did not constitute error at all.

The City should not be heard to assert this issue in this court for the first time.

II.

THE FEDERAL ANTI-INJUNCTION STATUTE DOES NOT PROHIBIT A DISTRICT COURT, EXERCISING DIVERSITY JURISDICTION, FROM PROTECTING OR EFFECTUATING ITS JUDGMENT ORDER BY RESTRAINING PARTIES TO A DECLARATORY JUDGMENT FROM RELITIGATING THE SAME ISSUES IN A STATE COURT PROCEEDING.

The City argues in its petition that the Federal Anti-Injunction Act, 28 USC Sec. 2283, is violated by those provisions of the judgment order in this case which restrained certain of the parties from proceeding to relitigate their claims in a state court. The section reads as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, *or to protect or effectuate its judgments.*" (Emphasis supplied)

Apparently, the particular provisions complained of by the City are as follows:

> "4. The Defendant, City of Chicago is ordered to forthwith dismiss its counterclaim filed on April 25, 1972 in the Circuit Court of Cook County and now pending there as case No. 69 CH 1823.
>
> 5. Cross-Plaintiff, City of Chicago, is hereby restrained and enjoined from filing or maintaining any counter-claim, cross-claim, or other action for indemnity against Kenny Construction Company, S. A. Healy Company, James McHugh Construction Company, individually or d/b/a Kenny-Healy-McHugh, a joint venture, under the provisions of contract K-4 in any of the litigation now pending in the Circuit Court of Cook County, Illinois, as recited in paragraph 1 hereof.

7. The additional defendants herein named as Plaintiffs in the underlying lawsuits mentioned in paragraph 1 hereof are hereby restrained and enjoined from proceeding against Kenny Construction Company; S. A. Healy Company and James McHugh Construction Company, individually or d/b/a Kenny-Healy-McHugh, a joint venture, in any of the lawsuits now pending in the Circuit Court of Cook County, Illinois, as recited in paragraph 1 hereof, and said additional defendants are hereby further restrained and enjoined from making any claims or instituting any further lawsuits against said contractors and/or joint ventures growing out of the work performed by the City which caused the damages complained of in the underlying lawsuits, if any."

The City's petition concludes that the above portion of the District Court's judgment order is prohibited by Sec. 2283 as interpreted by this Court in *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). We believe that the City's reliance thereon is misplaced. Section 2283, as noted by this Court in both *Younger* and *Huffman*, provides that a Federal court may not enjoin a state court proceeding unless one of the three statutory exceptions is met. In addition to these statutory exceptions, *Younger* established, in criminal cases, the irreparable harm test as an additional jurisdiction exception to Section 2283. This test was later extended to civil cases in *Huffman*. Since this case rests within the ambit of the statutory exception "to protect or effectuate its judgments", the irreparable harm test expressed in *Younger* and *Huffman* should not control the consideration of this case. Nor is the principle of comity affronted by the restraining order here. Section 2283 clearly enables a Federal court to protect or effectuate its judgments by means of an injunction, if necessary. The City's suggestion that the District Court in this case was precluded from

enforcing its order by means of an injunction against a state court proceeding is not only contrary to the statutory provisions of Section 2283, but the adoption of the City's argument would emasculate the efficacy of that Federal court's decision for all practical purposes since identical issues were pending in the underlying state cases.

The instant case was originally filed by the respondent insurance company seeking a determination as to the question of coverage or non-coverage under a policy of insurance pursuant to the Federal Declaratory Judgment Act in 28 U.S.C. Sec. 2201. Its complaint stated that the joint venture failed to abide by the provisions of the insurance contract by causing or allowing damage to buildings along the construction site without taking steps to arrest or correct the damages. Thereafter, the City filed a cross-claim against the Joint Venture seeking indemnification for any damage caused by the City. It also filed a counter-claim against the insurance company seeking coverage as an "additional insured" for damage it caused, or, in the alternative, for coverage under the "indemnity provisions" of the insurance policy. Naturally, a necessary element in any determination of the indemnity questions required a previous determination as to who caused the damages. As will be seen, this question was resolved against the City.

Thus, it was the City which put at issue the question of who caused the damages, as well as the indemnity points. At the conclusion of the proofs, the Court ruled that all of the damage alleged in the state court cases was caused by the City, that the City's work in relocation was not part of contract K-4, and, thus, the City was not entitled to indemnification by the Joint Venture for the City's negligence.

The "restraining" provisions of the District Court's order simply sought to insure that its findings would not be relitigated in the pending state cases, where issues identical to those determined by the District Court were also pending.

As we have seen, Sec. 2283 of Title 28 U.S.C. specifically excepts from general prohibition against enjoining state court proceedings injunctions issued by a Federal Court "in aid of its jurisdiction, *or to protect or effectuate its judgments.*" This relitigation exception has been recognized by the Court of Appeals in two circuits, *International Association of Machinists and Aerospace Workers* v. *Nix,* 512 F. 2d 125 (5th Cir. 1975) and *State of Oklahoma ex rel Wilson* v. *Blankenship,* 447 F. 2d 687 (10th Cir. 1971). In addition, this Court, by implication, has recognized this theory in *Atlantic Cost Line R.R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S. Ct. 1793, 26 L.ed. 2d 234 (1970).

The purpose of this exception is to insure that parties who successfully maintain an action in a federal tribunal will not be subject to a relitigation of the same issue in a state court with the attendant possibility of a different result. The determination that the Joint Venture caused no damage and that the City caused all of the damage was a necessary finding in order to reach the declaration of rights under the insurance policy issued by the court below. Certainly, a Federal court is entitled to make certain that the successful parties before it will not be subject to a relitigation in a state tribunal of issues decided by that Federal court. Similarly, the trial court's determinations with respect to the indemnification issue should not be capable of relitigation in a state court. A Federal court should and does have the power to insure

BLEED THROUGH

the integrity of its decisions by means of an order restraining parties from relitigating its orders and determinations in a state court.

There is thus presented in the instant case a classic illustration of the wisdom displayed by the Congress in incorporating into Section 2283 the exceptions that it did. The injunction issued by the trial court in the instant case was clearly issued by that court in order "to protect and effectuate its judgments". Section 2283 was certainly not violated by the issuance of that injunction. Indeed, both the letter and spirit of the section in its entirety were wholly complied with.

III.

NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS ERRED IN REFUSING TO EXTEND THE INDEMNITY PROVISIONS OF THE SUBWAY CONSTRUCTION CONTRACT TO INCLUDE THE SEWER AND WATER LINE RELOCATION BY THE CITY.

The District Court and the Court of Appeals, in reaching their respective determinations as to whether the indemnity provision of contract K-4 would operate to entitle the City to be held harmless for its negligence in relocating city sewer and water lines, were faced with two fundamental questions. These were:

1. Was the relocation work part of the subway contract and therefore included in the indemnity risk of the contract?

2. If so, is the indemnity language enforceable?

From the onset of the litigation in this matter, the City has steadfastly maintained that the relocation project was a part of the contract, and that the language of in-

demnity was broad enough to include the City's negligence in relocation. To date, both the District Court and the Court of Appeals have concluded as a matter of law that the relocation work was without the subway contract and that the City is therefore not entitled to indemnification.

Since this issue presented a question of contractual interpretation, the Court of Appeals determined the intent of the parties from an examination of the entirety of the contract. *United States* v. *Seckinger,* 397 U.S. 203 (1969). *Nice Ball Bearing* v. *M. H. Lescure,* 227 F. 2d 118 (7th Cir. 1955).

In doing so, the Court noted that the sewer relocation work was not specified in the contract documents, but only appeared under the legend "work by others". In addition, the price for the sewer work was not included in the bid. Thus, the Court concluded that the relocation work was specifically excluded from the subway contract. This being so, the City's negligence was therefore not covered by the contract's indemnity provision either as to the Joint Venture or the Insurance Company.

The Court then considered the City's assertion that the indemnity language was broad enough to cover the City's negligence both within and without the contract. In relying on the "other contracts" provision, which enabled the City to either reserve work not covered by the contract or to grant other contracts, the Court concluded that the City was a collateral contractor, and that the contract did not intend to expand the indemnity provision to collateral contractors. Certainly, the City could not possibly be serious in contending that the contract language provided for the Joint Venture to indemnify the City for the negligence of all collateral contractors. As

noted by the Court of Appeals, such a conclusion "would obviously be absurd".

Since the Court decided that the contract does not include the sewer work, and that perforce its indemnity provisions did not cover such work, the court never reached the question of the enforceability of the indemnity language. With the case having been fully adjudicated by the decision on the scope of the contract, the court did not need to address itself to any further issues. But the City's petition discusses at length certain Illinois authorities on the enforceability of indemnity provisions which are thus outside the pale of this case.

Whatever may be the Illinois law on such indemnity provisions, it is not applicable or even relevant here because the courts below have determined that the contract containing the indemnity provisions which the City is at such pains to discuss in its petition did not embrace the work which caused the damages complained of originally. Thus, the City's assertion that the courts below misapplied the Illinois law on enforceability of indemnity provisions in a contract finds no support in the record. It could not, since the courts below were not even required to pass on the question and did not, in fact, do so.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

75-1483

No. ~~75-14852~~

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Petitioner,

vs.

KENNY CONSTRUCTION COMPANY, A CORPORATION, S. A. HEALY COMPANY, A CORPORATION, AND JAMES McHUGH CONSTRUCTION COMPANY, A CORPORATION, d/b/a KENNY-HEALY-McHUGH, A JOINT VENTURE, AND ROYAL INDEMNITY COMPANY, A CORPORATION,
Respondents.

ANSWER OF ROYAL INDEMNITY COMPANY TO PETITION FOR WRIT OF CERTIORARI.

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CITY OF CHICAGO, A MUNICIPAL CORPORATION,
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Respondents.

ANSWER OF ROYAL INDEMNITY COMPANY TO PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED FOR REVIEW.

Whether objections to the judgment of the District Court can be raised for the first time on Petition for Writ of Certiorari;

Whether injunctions issued as an incident of a declaratory judgment, and for the obvious purpose of delineating the *res judicata* effect of the declaratory judgment, violates principles of comity and federalism or are in the nature of injunctions needed to protect or effectuate the declaratory judgment within the meaning of 28 U. S. C. Section 2283;

Whether the District Court and Court of Appeals correctly concluded that under the law of Illinois the City may not claim indemnity for damages caused by City forces in the performance of work specifically reserved to the City and excluded from the contract containing the indemnity agreement.

STATEMENT OF THE CASE.

This declaratory judgment action was commenced in the Northern District of Illinois by Royal Indemnity Company (Royal) for resolution of coverage questions and determinations of Royal's rights and responsibilities under a policy of liability insurance as they related to several property damage cases pending in the Circuit Court of Cook County, Illinois. The named insured under Royal's policy was Kenny Construction Company, S. A. Healy Company and James McHugh Construction Company, d/b/a Kenny-Healy-McHugh, a joint venture (the Venture); by endorsement, the City of Chicago (City) was made an additional insured for liability arising out of a contract awarded by the City to the Venture whereunder the Venture undertook to perform a portion of the work involved in extending the Kennedy Rapid Transit System.

Royal's declaratory judgment action was brought under 28 U. S. C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure. Federal jurisdiction was invoked on the basis of diversity of citizenship. In addition to the City and the Venture, the plaintiffs in the state court lawsuits were made parties defendant to the declaratory judgment action, and were served with summons.

The City crossclaimed against the Venture, seeking a declaration that it was entitled to indemnity against the underlying state court suits by virtue of an indemnity provision in the contract under which the Venture performed a portion of the Rapid Transit extension project.

The City also filed a counterclaim against Royal, seeking a declaration that Royal was obligated under the insurance policy to defend and indemnify the City in the state court suits.

Royal's Complaint for Declaratory Judgment, as finally amended, was in six counts, alleging the existence of various

coverage questions and breaches of policy conditions that affected Royal's duty to defend and indemnify the Venture and City in the state court litigation (Royal was defending the Venture in the state court suits under a reservation of rights; no tender of the defense of the City, as an additional insured under the Royal policy, was made by the City until the City filed its counterclaim in this declaratory judgment action).

The District Court, after a non jury trial, entered judgment, the gist of which was that the City was not entitled to be indemnified by the Venture against the property damage suits being pressed in the state court, and that Royal had no duty under the policy to defend or indemnify the City against those claims. Judgment was entered against Royal on the other asserted grounds for declaratory relief.

The City appealed from the judgments of the District Court that the damages for which the City was being sued in the state court actions did not "accrue against the City in consequence of" the granting of the contract to the Venture" or "in anywise result therefrom," and that Royal's policy did not cover the City's potential liability to the property damage claimants since the City's liability did not arise out of "work being done by" the Venture for the City "under the project." Royal cross-appealed from an award of attorneys fees in favor of the Venture. The Venture cross-appealed from denial of additional attorneys fees claimed in the District Court.

The Court of Appeals for the Seventh Circuit affirmed the basic judgment of the District Court that the City was neither entitled to indemnity from the Venture under the provisions of the contract let by the City to the Venture nor to coverage under Royal's policy. The Court of Appeals also reversed the award of attorneys fees to the Venture against Royal, but that portion of the judgment by the Seventh Circuit is not involved in the City's Petition. The opinion of the Court of Appeals is reported at 528 F. 2d 184.

The trial before the District Court was lengthy and the record on appeal is voluminous, but, for the immediate purpose of setting forth the basic facts, they may be summarized as follows:

In January, 1968, the City advertised for bids on a public works project involving the construction of an extension to the Kennedy Rapid Transit system. The entire extension project, which totaled five miles (T. 1480) is referred to as "Project Ill UTG-2"; the particular portion of the project involved in this cause, *i.e.*, the construction of a subway structure from Logan Boulevard to Woodard Street, is referred to as "Contract K-4" (five other "K" contracts were let by the City). The work to be performed under Contract K-4 was "generally described" by the City as follows (Exhibit 14, Page A-1):

> "The work to be performed under this contract consists of the furnishing of all labor, materials, plant, equipment, and incidental and performing all operations necessary to construct approximately 2,560 lineal feet of subway and all appurtenant and collateral work in accordance with the Contract Documents. The work will be constructed open cut."

The Venture bid on Contract K-4 and on March 21, 1968, was awarded the contract by the City. The City's statement on page 5 of its Petition that the contract was granted on June 23, 1967, is inaccurate. Among the General Conditions contained in the K-4 contract was the following indemnity provision (Exhibit 14, Page 4):

> "INDEMNITY
>
> Contractor shall indemnify, keep and save harmless the City, its agents, officials and employees, against all injuries, deaths, loss, damages, claims, patent claims, suits, liabilities, judgments, costs and expenses, which may in anywise accrue against the City in consequence of the granting of this contract or which may in anywise result therefrom, whether or not it shall be alleged or determined that the act was caused through negligence or omission of the Contractor of his employees, of the subcontractor or his employees, if any, or of the City of Chicago or its employees, and the Contractor shall, at his own expense, appear, defend and

> pay all charges of attorneys and all costs and other expenses arising therefrom or incurred in connection therewith, and, if any judgment shall be rendered against the City in any such action the contractor shall, at his own expense, satisfy and discharge the same. Contractor expressly understands and agrees that any performance bond or insurance protection required by this contract, or otherwise provided by Contractor, shall in no way limit the responsibility to indemnify, keep and save harmless and defend the City as herein provided."

Royal issued a general liability policy with an effective date of March 18, 1968, naming the Venture as the named insured (Exhibit 1, Endorsement 15) and the City as an additional insured (Endorsement 2). Policy Endorsement 3 provides:

> "It is agreed that coverage hereunder is limited to work being done by the named insured for the City of Chicago under the project known as Project Ill-UTG-2 Contract K-4, Kennedy Rapid Transit Project, Logan Blvd, and Milwaukee Avenue."

Before the Venture started any construction work, the City undertook to relocate sewer and water lines from the center of Milwaukee Avenue and place them under the sidewalk on the east side of Milwaukee Avenue (T. 1305). Relocation of the sewer lines by the City involved tearing up the existing sidewalk and digging a trench 5 or 6 feet across (T. 1456) and 10-12 feet deep, laying the new sewer line, backfilling the trench with sand, then reopening the excavation a week or so later to a depth of 5 or 6 feet to lay the waterline (T. 1767, 1316-1320, 1585), again backfilling with sand and installing a temporary asphalt sidewalk. In those places where only the water lines were relocated, there was only one excavation to the 5-6 foot depth.

The Water Department and the Sewer Department each drew its own plans for this work and only City employees were engaged in the work (Dep. Goldberg 10/5/72, p. 46; T. 1407).

The Venture had set up a field office at the job site of K-4 on March 22, 1968, but no actual construction work was done

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in the vicinity until after the City Sewer Department and the City Water Department had finished their work (T. 728).

Prior to the time the Venture commenced any construction work in the vicinity, damage was noted to buildings in the 2600 and 2700 block of Milwaukee Avenue. Of particular concern was damage to the building at 2747-2765 Milwaukee, a forty-year old, three-story structure which fronted on the east side of Milwaukee Avenue for a distance of about 100 feet, and is frequently referred to in the testimony as the Lanski Building. On or about May 7, 1968, in the course of trenching by the City of the sewer and water lines in front of the Lanski Building, there had been a cave in, exposing the foundation of the building and collapsing the earth from underneath the four-foot foundation (T. 1585, 1591, 730, 797-803).

On May 11, 1968, Dr. Joseph Moles, an optometrist who maintained offices at 2747½ Milwaukee Avenue, as he was told to do by Alfred Fosco, supervising engineer for the entire project (T. 1513), wrote the following letter to David Goldberg, Chief Engineer of the City Sewer Department (Pl.'s Ex. 60):

> "This is to report that on May 7, when the city sewer department was excavating in front of my office at 2747½ Milwaukee Avenue a considerable amount of damage was done to my office.
>
> The plate glass window (the return window) was broken in two places. The front plate glass window was pulled away from its frame, and the frame is now buckled. The plate glass window (the return window mentioned above) is lettered in gold leaf, so when you replace it the window will have to be re-lettered in gold leaf. The plaster on the inside of my office is now badly cracked from ceiling to floor, which happened at this time also, and which was called to the attention of some of your workmen on May 7. Also, in my laboratory there is now a gap of about 1" which was pulled loose between the floor and the footing, which occurred on May 7. I have been instructed to report these damages to you for at-

tention, and ask that you please let me hear from you as soon as possible as to when these damages will be taken care of."

A carbon copy of Dr. Moles' letter was sent to the Bureau of Engineers, whose Harry F. Zalewski, the Chief Engineer, advised Mr. Goldberg, Chief Engineer for the City Sewer Department that "we (the Bureau of Engineering) will not handle damages claims resulting from Bureau of Sewers' work." Nevertheless, Fosco did visit Dr. Moles' office and reported to Zalewski (Pl.'s Ex. 61, T. 1520):

"This is a legitimate complaint. In fact, more damage to his plate glass windows have occurred as of this date, and after his letter was written. Before any work was started in this area, settlement marks were put on all buildings. Later the City Sewer Department came in and laid a 12-inch ductile iron sewer along this building in the sidewalk area, at a depth of between 10 to 12 feet, about 70 lineal feet. As of June 12, our last settlement readings, we find that this building at the above address has dropped one and a quarter inches since the sewer was put in. When the Sewer Department was digging along this building, I saw that the foundation was very poor. I did not see any spread footing. As I recall, the foundation was about two feet deep. The Sewer Department put in some braces where possible. It seems that they did not help too much. In my opinion, something should be done to this building. I believe that Dr. Moles was told to send in an estimate of cost for repairs by the Sewer Department. He is not the owner of the building. . . "

News of complaints of damage from the City's work first reached the Venture in the form of a letter dated June 14, 1968, from a subcontractor. On June 26, the Venture wrote to the City:

"We wish to call your attention to a very serious and hazardous condition that exists on the above-captioned contract.

Excavation performed by the City of Chicago, Dept. of Water & Sewers, in installing temporary sewers along

the building line on both sides of Milwaukee Avenue has seriously endangered several of the adjacent structures. This excavation was performed in advance of any construction work by us.

We call your particular attention to the building at 2747 North Milwaukee Ave. Extreme and damaging settlement has occurred in this structure and, in our opinion it is still in an unstable condition, the nature and extent of which makes it unsafe for occupancy. Serious structural damage has occurred and, in our judgment, this building should be underpinned before any work is performed on our part in its vicinity. This is a matter that should have your immediate and prompt attention, since we are preparing to begin augering for the placement of soldier piles in this area within next two days, and any delays incurred by our forces will, because of circumstances beyond our control, increase the time required for us to complete our work.

We wish to inform you that we will accept no responsibility for any damage caused to existing structures by the work performed by the forces of the City of Chicago. We urge you to immediately investigate this matter so that proper lines of responsibility can be established so that our work can proceed in an uninterrupted manner."

The Bureau of Engineering of the City Department of Public Works responded on July 5:

"We acknowledge receipt of your letter of June 26, 1968 regarding the condition of a building at 2747 N. Milwaukee Ave.

Please proceed with your work in accordance with contract provisions. In particular, we direct your attention to Section III (page ASC-8), 'Care of Existing Structures and property and Contractor's Liability.' "

A copy of the June 26 letter from the Venture to the City was sent to Royal, and an adjuster was dispatched to the job site "to establish previous damage to a specific building prior to . . . joint venture." He reported back that "damage will continue till (sic) problem remedied while insured is present on site and even if they cause no further damage."

Within a few days of the writing of the June 26 letter to the City, the Venture commenced the subway construction, starting with putting "soldier piles" in place by augering holes into which the piles (basically I-beams) were inserted and then filling in the holes with cement (T. 1796). Actual excavation for the subway commenced in August. The Venture did its work in conformity with the plans and specifications set forth in the City's Contract K-4. Sheeting was used between the soldier piles and the cut was shored and braced. Periodic checks were made to affirm that the piles remained vertical and the vertical integrity of the subway excavation walls was maintained throughout (T. 1526-1530, 1565-1567, 1583). Nevertheless, the Lanski Building continued to sink, so that by February 11, 1969, the settlement had reached six inches, presenting a peril to the occupants.

Suits against the City and the Venture were instituted by adjoining property owners in the Circuit Court of Cook County; those suits are described in the 17th finding of fact by the District Court (City's Petition, pages 8a-10a). Royal undertook the defense of the Venture under a reservation of rights, then filed this declaratory judgment action in February, 1970, seeking resolution of coverage issues that had arisen.

The declaratory judgment suit was tried as a non jury matter from March 12 to March 29, 1974. At the conclusion of the trial, the District Court entered findings of fact, conclusions of law and final judgment as contained in the Appendix to the City's Petition. Appeals were taken by the City, the Venture and Royal from various portions of the judgment of the District Court; so far as is relevant to the City's Petition, the Court of Appeals for the Seventh Circuit affirmed the judgment that the City was not entitled to indemnity from the Venture or coverage by Royal.

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ARGUMENT.

I.

THE CITY'S COMITY ARGUMENT DOES NOT WARRANT SUPREME COURT REVIEW.

A. The Issue Was Not Raised by the City in Either the District Court or the Court of Appeals.

The City argues that the judgment order entered by the District Court violates the principle of comity codified by Section 2283 of 28 U. S. C. and recently at issue in *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975). This issue has never before been raised, in the District Court or in the Court of Appeals, and its interjection at this stage is grossly violative of the rule that the Supreme Court will not consider matters that a party fails to present in the lower courts, *Cardinal* v. *Louisiana*, 394 U. S. 437 (1969).

Apparently anticipating this obvious objection, the City, referring to *Huffman* v. *Pursue, Ltd.*, states at page 22 of its Petition:

> "Although the abstention principle of *Younger* v. *Harris* had not been raised in the District Court, this Court reversed the judgment of the District Court solely on abstention grounds and remanded the case to the District Court for proceedings in accordance with that principle."

Huffman v. *Pursue, Ltd.* arose on direct appeal from a three-judge District Court which had enjoined execution of a portion of an order entered under an Ohio nuisance statute. Rather than appealing the judgment entered by the Ohio trial court, the appellants filed suit in the District Court seeking the injunction, which was granted on the ground that the nuisance statute violated the First Amendment. The principles of comity and

federalism underlying the rule of *Younger* v. *Harris*, 401 U. S. 37 (1971)—that Federal Courts will not normally enjoin pending proceedings under a State criminal law—were held, in *Huffman*, to be applicable to a civil proceeding "which in important respects is more akin to a criminal prosecution than are most civil cases," 420 U. S. 592 at 604. The decision in *Huffman* was to remand the case of the District Court for consideration of whether exceptions to the *Younger* principles might exist which would warrant continued Federal jurisdiction inasmuch as

> . . . The judgment and opinion of the District Court give no indication that it considered whether it should have stayed its hand in deference to the principles of federalism which find expression in *Younger* v. *Harris*.
>
> 420 U. S. 592 at 599

The quoted observation concerning the unreported decision of the District Court in *Huffman* may support the City's claim that "the abstention principle of *Younger* v. *Harris* had not been raised in the District Court," but, it is submitted, cannot fairly be said to amount to a general pronouncement that alleged comity issues are an exception to the normal rule that issues not raised in the District Court are not preserved for review. *Huffman* suit was brought specifically to enjoin enforcement of a State statute, thus a threshold issue of Federal abstention was both obvious and inherent. The situation presented in this case is not analogous: absent is any consideration, upon which the *Younger* and *Huffman* decisions partly depend, that a court of equity will not normally interfere with criminal prosecutions; prior to the filing of this declaratory judgment action there was no litigation anywhere to which Royal was a party or which would serve to resolve the coverage issues that had arisen; the bringing of the declaratory judgment as proceedings to resolve coverage questions in advance of judgment involving the claimant and insured in the underlying suit has long been endorsed as both appropriate and desirable, *Sears, Roebuck*

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and Company v. *Zurich Insurance Company*, 422 F. 2d 587 (7th Cir. 1970); none of the parties to this case ever questioned the jurisdiction or authority of the District Court to act or to fully resolve the questions presented—to the contrary, the City, by filing its crossclaim against the Venture for indemnity under the contract and its counterclaim seeking a declaration that it was entitled to coverage under Royal's policy, clearly enlisted the offices of the District Court and became bound by the Court's resolution of those issues.

The judgments against the City followed a full, lengthy and difficult trial and appellate review on the merits of the various claims asserted by the parties against each other; at this late date the City should not be heard to urge that those judgments should be upset on the basis of an afterthought claim dredged out of the record to gain a foothold for further appellate review.

B. The Injunctions Entered by the District Court Were Proper in that They "Protected and Effectuated" the Declaratory Judgment.

Neither Royal nor any of the other parties sought enjoinment of any phase of the State Court litigation; Royal sought a declaration that its policy defenses were well-founded, the City sought a declaration that it was entitled to be indemnified by the Venture and covered as an additional insured under Royal's policy. Since resolution of the claims between Royal, the Venture and the City gave rise to the issue of whether the property damages being alleged in the State Court suits accrued "in consequence of" or "in anywise" resulted from the granting of the K-4 contract to the Venture, it became necessary to inquire into the factual detail of the State Court suits.

While much of the evidence pertained to claims arising out of damage to the Lanski building, claims arising out of damage to other buildings were also considered.

After hearing the evidence, the District Court concluded that the City and the Venture were being sued because of damage

caused solely by the City in the course of work withheld by the City from the scope of the K-4 contract and prior to commencement of actual work by the Venture. Having made such a finding as to some aspects of the claims which were also at issue between the state court litigation—*i.e.*, the claims between the City and the Venture as to which, if either, was liable to the property damage claimants, and whether the claims for indemnity being asserted by the City against the Venture in the State Court were well-founded—became *res judicata*. The injunctions were nothing more than expressions of the *res judicata* effect intended by the declaratory judgment. As a practical matter, the injunctions obviated the need for having to plead the declaratory judgment as affirmative defenses in the State Court actions, and the possible need for the State Court judges to wade through the findings of fact, conclusions of law and declaratory judgment to determine what had been decided in the District Court.

28 U. S. C., Section 2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The exception contained in Section 2283 for injunctions "to protect or effectuate" a federal judgment gives the District Court a right to "enjoin a state proceeding which is precluded under the doctrine of *res judicata*," *Woods Exploration & Producing Company* v. *Aluminum Company of America*, 438 F. 2d 1286 at 1312 (5th Cir. 1971), followed in *Donelon* v. *New Orleans Terminal Company*, 474 F. 2d 1108 (5th Cir. 1973), wherein Judge Goldberg observed (at page 1114):

> . . . While Section 2283 was designed to ensure the state courts' adjudicative potency, its exceptions assure that the federal courts and their judgments will not be eunuchized and that their muscularity will not be atrophied.

To the same effect is *Southwest Airlines Co.* v. *Texas International Airlines*, 396 F. Supp. 678 at 684 (N. D. Tex. 1975).

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Prior to the entry of judgment in this case, issues of responsibility to the property owners and the City's claim to indemnity against the Venture were at issue both in the District Court and the State Court. The indemnity issue was raised in the District Court when the City elected to file its crossclaim against the Venture. Had one of the State Court actions proceeded to judgment on the merits, the District Court would have to give *res judicata* effect to that judgment. As it happened, the District Court was the first to reach a judgment, and there is nothing in the concept of comity or Section 2283 that prevents the District Court from spelling out the effect of its judgment.

II.

THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS WERE CORRECT AS A MATTER OF ILLINOIS LAW.

In *Westinghouse Electric Elevator Co.* v. *LaSalle Monroe Building Corp.*, 395 Ill. 429 at 433 (1947), the Illinois Supreme Court stated:

> ". . . an indemnifying contract will not be construed, as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract . . . or such intention is expressed in unequivocal terms."

Dozens of Illinois Appellate and Federal diversity cases have been decided in the nearly thirty years that have passed since the *Westinghouse* decision, and there developed a distinct trend toward expanding the effective scope of indemnity agreements. The erosion of the conservative approach of *Westinghouse* continued despite the decision of the Illinois Supreme Court in *Li Petri* v. *Turner Construction Co.*, 36 Ill. 2d 597 (1967), wherein a general contractor asserted a claim for indemnity against an electrical subcontractor which had a contract to install an electrical system in a building under construction

providing that the electrical contractor assumed "entire responsibility and liability" for damage "growing out of or resulting from the execution of the work provided for in this Contract or occurring in connection therewith." The general contractor argued that when the electrical contractor received a change order to include maintenance as well as installation, the electrical contractor assumed the obligation to indemnify the general contractor with respect to maintenance. The Court, in rejecting this argument, stated (36 Ill. 2d at 611):

> "On the basis of the record before us, we conclude that the occurrence *did not grow out of, result from or occur in connection with any work of Fishbach provided for in the subcontract containing the indemnification clause.* Although the accident may have arisen in part from work performed by Fishbach on the material host, this work was not provided for in the subcontract . . ."

The trend toward liberal endorsement of indemnity agreements as a matter of "good business" was halted in *Tatar* v. *Maxon Construction Co.*, 54 Ill. 2d 64 (1973) wherein the Court held broad indemnity agreement insufficient to entitle one to claim indemnity for his own negligence, stated that each contract must stand on its own language, fairly and reasonably interpreted in light of all of its language and provisions, and that indemnity agreements are to be "measured against the standards set forth in *Westinghouse.*"

Tatar was followed by *Zadak* v. *Cannon,* 59 Ill. 2d 118 (1974), which again held an indemnity agreement insufficient to require the indemnitor to answer for the indemnitee's own default; clearly, the agreements construed in *Tatar* and *Zadak* would have been sufficient to impose indemnity had cases such as *De Tienne* v. *S. N. Nielsen Co.*, 45 Ill. App. 2d 231 (1963) or *White* v. *Morris Handler Co., Inc.*, 7 Ill. App. 3d 199 (1972), relied on by the City, been followed.

The City states (Petition, page 26) that the 1973 Illinois Statute declaring void as against public policy agreements in

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construction contracts which purport to indemnify one against his own negligence has no application since contract K-4 was entered into prior to 1973. However, the Appellate Court opinion in *Tatar* v. *Maxon Construction Co.*, 3 Ill. App. 3d 351 (1973) did give weight to the Legislature's expression of public policy, and in upholding the constitutionality of the statute, the Illinois Supreme Court, in *Davis* v. *Commonwealth Edison Co.*, 61 Ill. 2d 494 (1975) expressed views that warrant consideration in identifying the weight of Illinois law, particularly with respect to the diminishment of the prophylactic effect of tort liability caused by indemnity agreements.

But even in the "liberal" period post-*Westinghouse* and pre-*Tatar*, no Illinois Court has ever held that an indemnity agreement would encompass work that was not part of the contract let to the indemnitor. A few examples of decisions, in addition to *Li Petri* v. *Turner Construction Co.*, 36 Ill. 2d 597 (1967), mentioned above, which hold that indemnity agreements only cover work included in the contract containing the agreement, are: *McInerney* v. *Hasbrook Construction Company*, 16 Ill. App. 3d 464 (1974) (general contractor not entitled to indemnity from painting subcontractor where indemnity agreement was contained in a contract referring the "Models number 2500, 2600, 2800 and 2900" and original plaintiff was working on a "Model 3600" at the time of the injury; invoices offered to show the painting agreement has been expanded by usage to include the "Model 3600" properly excluded); *Wilson* v. *Illinois Bell Telephone Company*, 19 Ill. App. 3d 47 (1974) (owner not entitled to indemnity from contractor which had undertaken to build a platform to protect switching equipment while engaged in removing ceilings at owner's plant; employee of another contractor fell on the platform; injured employee's work not connected with the job that was the subject of the contract containing the indemnity agreement); *Collins* v. *Montgomery Ward & Co.*, 21 Ill. App. 3d 1037 (1974) (plaintiff entered into contract to install aluminum siding on Ward's

building; contract, dated April 16, contained indemnity agreement; on April 21, plaintiff purchased ladder from Wards and while using this ladder fell; *held:* it would be an "undue extension" of the indemnity agreement to allow it to be used by Ward in defense of the plaintiff's strict liability suit against Ward); and *Knickerbocker Roofing* v. *Mendius Associates,* 95 Ill. App. 2d 96 (1958): Knickerbocker as contractor to the Federal Government to perform work on the main Post Office Building in Chicago, gave a subcontract to Mendius to furnish labor and materials with reference to installation of certain insulated roofing materials; the subcontract provided:

> "The Subcontractor does hereby agree to indemnify and save harmless the Contractor, its employees and agents, and the Government, from all loss, damage, costs and expenses which any of them may suffer or sustain or be threatened with liability for arising, either under the laws of the State of Illinois or of the United States of America, or otherwise, out of performance of this contract by the Subcontractor, its agents, employees or materialmen."

Prior to execution of the written contract, an oral agreement had been made whereby for a fee Mendius would use its hoist to lift Knickerbocker's materials to the roof of the post office.

Two Mendius employees were injured while hoisting both a roofing substance as part of the written contract and, simultaneously two cans of gasoline which the trial court found to have been within the oral contract. The employees brought suit action seeking a declaration that it was entitled to indemnity.

In affirming a judgment in favor of Mendius, the Court concluded that the threatened losses to Knickerbocker arose out of the performance of the oral contract, which contained no indemnity provision, and that the indemnity provision was not intended to apply to the activities outlined in the oral agreement. In distinguishing three of the decisions relied on by the City in this case, the Court stated (95 Ill. App. 96 at 103):

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> "Likewise, in the cases of *De Tienne* v. *S. N. Nielsen Co.*, 45 Ill.App.2d 231, 195 N.E.2d; 240; *Newberg Const. Co.* v. *Fischbach, Moore & Morrissey, Inc.*, 46 Ill.App.2d 238, 196 N.E.2d 513; and *Northern States Co., Inc.* v. *A. Finkl & Sons Co.*, 8 Ill.App.2d 419, 132 N.E.2d 59, cited by Knickerbocker, the respective courts were presented with situations wherein the indemnity provisions in question were contained within the only contracts applicable to the incidents out of which losses (actual or threatened) to the indemnitees arose. In other words, unlike the case at bar, these cases cited by Knickerbocker did not contain separate contracts providing for duties not enumerated in the contracts containing the indemnity provisions."

The District Court found (Finding of Fact 16, City's Petition, page 72):

> 16. As the court said in its oral statement at the conclusion of the trial, the work of the joint venture did not cause the damage to the buildings along Milwaukee Avenue and if the joint venture had done no work at all, the same damage would have occurred.

The Court of Appeals correctly noted that "the City's relocation work was activity *specifically withheld* from the K-4 contract." (City's Petition, page 26a.)

Given the accuracy of these two propositions, neither of which the City can seriously controvert on the basis of the record in this case, it is submitted that the only "fair and reasonable interpretation," as that expression is used in *Tatar* v. *Maxon Construction Co.*, 54 Ill. 2d 64 (1973) is that the City is being sued for damages caused by the City's own forces prior to the commencement of any work by the Venture under the K-4 contract, and not for any liabilities that in anywise accrued in consequence of or in anywise resulted from the granting of the K-4 contract.

CONCLUSION.

The claims by the City that principles of comity were infringed by the judgment of the District Court is neither timely nor substantial, and the results reached in the District Court and Court of Appeals are both supported by the record and the law of Illinois.

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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